No. 93-318

Supreme Court, U.S.
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Supreme Court of the United States
OCTOBER TERM, 1993

CONSUMER FEDERATION OF AMERICA, MCI COMMUNICATIONS CORPORATION, NEWSPAPER ASSOCIATION OF AMERICA, INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA, ASSOCIATION OF DIRECTORY PUBLISHERS, COMMERCE CLEARING HOUSE, INC., COX ENTERPRISES, INC., DIALOG INFORMATION SERVICES, INC., GE INFORMATION SERVICES, INFORMATON INDUSTRY ASSOCIATION, INTERNATIONAL COMMUNICATIONS ASSOCIATION, MCGRAW-HILL, INC., MEAD DATA CENTRAL, INC., NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL CABLE TELEVISION ASSOCIATION, INC., PRODIGY SERVICES COMPANY, TOWARD UTILITY RATE NORMALIZATION, WEST PUBLISHING COMPANY, THE WISCONSIN CITIZENS' UTILITY BOARD, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA, AMERITECH, BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, NYNEX CORPORATION, PACIFIC TELESIS GROUP, SOUTHWESTERN BELL CORPORATION, U S WEST, INC., *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether a district court must enter an antitrust consent decree order that it finds to be anticompetitive and contrary to the public interest, solely because the Justice Department has reasonable grounds for supporting the order.

2. Whether the D.C. Circuit's refusal to review a proposed decree modification under the explicit standard drafted by the district court and used consistently by the parties is inconsistent with a prior decision of this Court, with decisions in other circuits, and with sound administration of consent decrees.

RULE 14.1(b) AND RULE 29.1 STATEMENTS

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioners state that the list of parties in the Court of Appeals whose judgment is sought to be reviewed, is as follows:

United States of America
Ameritech
Bell Atlantic Corporation
BellSouth Corporation
NYNEX Corporation
Pacific Telesis Group
Southwestern Bell Corporation
U S WEST, Inc.
American Telephone & Telegraph Co.
ADAPSO, The Computer Software and Services Industry Association, Inc.
ALC Communications Corporation*
Alarm Industry Communications Committee*
Association of North American Directory Publishers
Commerce Clearing House, Inc.
CompuServe Incorporated*
Consumer Federation of America
Cox Enterprises, Inc.
Dialog Information Services, Inc.
The Dun & Bradstreet Corporation*
G.E. Communications & Services
Information Industry Association
International Communications Association
Leghorn Telepublishing Company*
LO-AD Communications of California, Inc.
LO-AD Communications of Nevada, Inc.
McGraw-Hill, Inc.
MCI Communications Corporation
Mead Data Central, Inc.
National Association of Broadcasters

* Parties below who have indicated they have no further interest in the outcome of the petition.

National Cable Television Association, Inc.
The Newspaper Association of America
Prodigy Services Company
Toward Utility Rate Normalization
West Publishing Company
The Wisconsin Citizens' Utility Board, Inc.

Pursuant to Rule 29.1 of the Rules of this Court, petitioners state as follows:

Association of Directory Publishers (formerly the Association of North American Directory Publishers) is the largest national association of independent publishers of telephone directories. Its members publish traditional print yellow pages directories and some of them also publish electronic enhancements to and versions of these directories. ADP has no parent company or non-wholly owned subsidiary.

Commerce Clearing House, Inc. publishes a wide variety of materials, provides on-line publishing products, and engages in distributive publishing services. CCH has no parent company or non-wholly owned subsidiary.

Consumer Federation of America is a non-profit coalition of over 240 pro-consumer organizations with 50 million individual members. Since 1968, it has represented the consumer interest before federal and state policymaking and regulatory bodies. CFA has no publicly held subsidiaries or affiliates.

Cox Enterprises, Inc. is a privately-held corporation engaged in a variety of telecommunications businesses, including mass media. Cox has no parent company. Cox's non-wholly owned subsidiaries and affiliates are:

Cox Cable Cleveland Area, Inc.
Cox Cable Quad Cities, Inc.
Cox Cable Saginaw, Inc.
Cox Cable Spokane, Inc.
Gold Book, Inc.
Manheim Investments, Inc.
Manheim Services Corporation

Manheim Auto Resale Services, Inc.
Bay Cities Auto Auction
Los Angeles Dealer Auto Auction
Southern California Auto Auction
Denver Auto Auction
Greater Tampa Bay Auto Auction
St. Pete Auto Auction
Georgia Dealers Auto Auction
Greater Chicago Auto Auction
Minneapolis Auto Auction
St. Louis Auto Auction
Newburg Auto Auction
Ohio Auto Auction
Portland Auto Auction
Clanton's Auto Auction
Fort Worth Auto Auctions
San Antonio Auto Auction
Texas Hobby Auto Auction
Harrisonburg Auto Auction
South Seattle Auto Auction
Utah Auto Auction
Manheim Metro Detroit Auto Auction
Manheim Auctions Government Services, Inc.
Arizona Auction Services, Inc.
Southwest Auto Auction
Arizona Auto Auction
Imperial Auto Auction
Daytona Auto Dealers Exchange
Florida Auto Auction of Orlando, Inc.
Lakeland Auto Auction
California Auto Dealers Exchange, Inc.
Riverside Auto Auction
Colorado Auction Services Corporation
Dealers Auto Auction of Dallas
Fredericksburg Auto Auction, Inc.
Fresno Auto Dealers Auctions, Inc.
Bishop Brothers Auto Auction
Georgia Auction Services, Inc.
Community Auction Resale, Services

Kansas City Auto Auction, Inc.
Missouri Auction Services Corporation
National Auto Dealers Exchange, Inc.
Manheim Finance Canada Inc.
New England Auto Auction, Inc.
Toronto Auto Auction
New Manheim Auto Auctions Limited
Manheim Auto Auctions Limited (Canada)
Manheim's Oshawa Dealers Exchange
New York Auto Auction Services, Inc.
North Carolina Services Corporation
Manheim Auto Auction
Pennsylvania Auction Services Business Trust
Texas Auto Auction Services, Inc.
Butler Auto Auction
Wisconsin Services Corporation
Las Vegas Auto Auction, Inc.

Dialog Information Services, Inc. is a provider of electronic information retrieval services from a wide variety of databases, covering such fields as science, business, and finance. Dialog's parent is Knight-Ridder, Inc., and its only non-wholly owned subsidiary is Article Express International.

GE Information Services (formerly known as G.E. Communications & Services), a division of General Electrict Company, provides a wide variety of electronic information services. GE Information Services has no publicly held subsidiaries or affiliates.

Information Industry Association is a trade association representing companies involved in the generation, distribution, transmission, and use of information. IIA has no parent company or non-wholly owned subsidiary.

The Information Technology Association of America (formerly known as ADAPSO, The Computer Software and Services Industry Association, Inc.), is the principal trade association of the computer software and services industry. ITAA has no parent company or non-wholly owned subsidiary.

International Communications Association is a not-for-profit business league of corporate, educational, and governmental users of telecommunications equipment, facilities, and services whose members collectively spend at least $23 billion per year on purchases of these products and services. ICA has no parent company or non-wholly owned subsidiary.

McGraw-Hill, Inc. is a provider of electronic publishing services and a variety of other information service offerings and products. McGraw-Hill's only publicly-owned affiliate is McGraw-Hill, Ryerson, Ltd., of Canada.

MCI Communications Corporation is a publicly held corporation engaged in a wide variety of telecommunications businesses, including but not limited to national and international voice and data telecommunications services and information services. MCI directly or indirectly owns interests in General Communications, Inc.; Infonet Services Corporation; Clear Communications Corporation; and AAP Telecommunications Pty. Ltd.

Mead Data Central, Inc. provides on-line legal, news, and business information services. Mead Data Central is a subsidiary of Mead Corporation. Mead Data Central has two wholly owned subsidiaries, Folio Corporation (a Utah corporation), and Mead Data Central International, Inc. (a Delaware corporation).

National Association of Broadcasters is a non-profit, incorporated association of radio and television broadcast stations and networks which serves and represents America's radio and television stations and all the major networks. NAB has no parent company or non-wholly owned subsidiary.

National Cable Television Association, Inc., a non-profit corporation, is the principal trade association representing cable television operators in the United States. Its members operate cable systems serving approximately 90 percent of the country's more than 50 million cable

television subscribers. NCTA has no publicly held subsidiaries or affiliates.

The Newspaper Association of America (formerly the American Newspaper Publishers Association) is a nonprofit corporation serving more than 1,250 member newspapers. The majority are daily newspapers accounting for more than 80 percent of the circulation in the United States. Membership also includes many non-daily U.S. newspapers and other newspapers published in the Western Hemisphere, Europe and the Pacific. Several hundred individuals and companies allied with the newspaper industry are associate members of NAA. NAA has no parent company or non-wholly owned subsidiary.

Prodigy Services Company is a general partnership of International Business Machines Corporation and Sears, Roebuck & Co. Prodigy provides a two-way, interactive on-line information and transaction service designed for consumers in their homes. Prodigy has no parent company or non-wholly owned subsidiary.

Toward Utility Rate Normalization is a tax-exempt organization that is the only statewide consumer organization in California which represents consumers in regulatory, legislative, and judicial proceedings. TURN has no parent company or non-wholly owned subsidiary.

West Publishing Company is a provider of American legal materials including online services, case reports, digests, statutes, encyclopedias, treatises, dictionaries, educational texts and reference materials, and CD-ROM products and law school texts.

The Wisconsin Citizens' Utility Board, Inc. is a nonprofit voluntary membership organization of Wisconsin residential, farmer, and small business utility consumers. CUB has no parent company or non-wholly owned subsidiary.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. ——

CONSUMER FEDERATION OF AMERICA, MCI COMMUNICATIONS CORPORATION, NEWSPAPER ASSOCIATION OF AMERICA, INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA, ASSOCIATION OF DIRECTORY PUBLISHERS, COMMERCE CLEARING HOUSE, INC., COX ENTERPRISES, INC., DIALOG INFORMATION SERVICES, INC., GE INFORMATION SERVICES, INFORMATON INDUSTRY ASSOCIATION, INTERNATIONAL COMMUNICATIONS ASSOCIATION, MCGRAW-HILL, INC., MEAD DATA CENTRAL, INC., NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL CABLE TELEVISION ASSOCIATION, INC., PRODIGY SERVICES COMPANY, TOWARD UTILITY RATE NORMALIZATION, WEST PUBLISHING COMPANY, THE WISCONSIN CITIZENS' UTILITY BOARD, INC.,

Petitioners,

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UNITED STATES OF AMERICA, AMERITECH, BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, NYNEX CORPORATION, PACIFIC TELESIS GROUP, SOUTHWESTERN BELL CORPORATION, U S WEST, INC., *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 993 F.2d 1572 (1993), and is reprinted at pages 1a-23a of the Appendix to this Petition ("App."). The opinion of the United States District Court for the District of Columbia is reported at 767 F. Supp. 308 (1991), and is reprinted at App. 24a-75a. The district court's decision was on remand from an opinion of the D.C. Circuit reported at 900 F.2d 283 (1990) (App. 76a-125a).

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1993. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The relevant portions of the Tunney Act, 15 U.S.C. §§ 16(e) and (f), are reprinted at App. 127a.

STATEMENT OF THE CASE

Introduction

This case involves a novel decision that strips district courts of their authority to make the decisive factual determinations governing the entry or modification of consent decrees, and transfers that authority, and hence effective control over judicial orders, to the Executive acting as prosecutor. The decision will radically affect the telecommunications industry. More broadly, it will alter the administration of consent decrees in virtually every area of the law.

The decision below holds that under the Tunney Act [1] and common law, a district court is not permitted to make an independent judicial determination of the competitive impact of a proposed modification to an antitrust consent

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[1] 15 U.S.C. § 16(b)-(h); App. 127a.

decree. The D.C. Circuit held that in deciding whether to approve an uncontested decree modification, district courts are "bound to accept" the views of the Department of Justice regarding the competitive impact of the proposal so long as the Department's views are reasonable and have substantial factual support. It therefore approved a decree modification that the district court with record support had found to be anticompetitive. *United States v. Western Elec. Co.*, 993 F.2d 1572, 1576, 1578, 1581-82 (D.C. Cir. 1993); App. 10a, 15a, 21a, 23a. Thus, the ruling below squarely presents the question whether district courts should make independent judicial determinations on the factual question of the competitive impact of a consent decree proposal, or whether they should merely review the reasonableness of the Department's proposal.

Summary of Prior Proceedings

A. The Decree. The Bell System long dominated the provision of telephone services and equipment in the United States. This nationwide vertically-integrated enterprise was based on local telephone monopolies that controlled access to consumers. In 1974, the United States brought a civil action alleging that the Bell System was continuing to use its bottleneck monopoly power to stifle competition.[2] In 1982, near the end of a lengthy trial, the government and AT&T proposed a settlement substantially granting the relief sought in the complaint, in-

[2] *United States v. AT&T*, 552 F. Supp. 131, 139 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). The United States had instituted a civil action in 1949 to divest AT&T of subsidiaries that manufactured telecommunications equipment. In 1956, the Department agreed to what a congressional committee later termed "a token settlement" of that action involving no divestiture. Report of the Antitrust Subcommittee of the House Committee on the Judiciary on the Consent Decree Program of the Department of Justice, 86th Cong., 1st Sess. 55 (1959).

cluding divestiture of the System's local telephone companies (known as Bell Operating Companies or "BOCs").[3] At the request of the Department, the decree prohibited the BOCs from entering "lines of business" where they would be able to abuse their bottleneck power over local phone lines—long-distance service, "information services," and manufacturing of telecommunications equipment. 552 F. Supp. at 227-28.

The district court reviewed the 1982 proposal under the Tunney Act, 15 U.S.C. § 16(b)-(h), which requires that "[b]efore entering any consent judgment proposed by the United States under . . . [the antitrust laws], the court shall determine that the entry of such judgment is in the public interest."[4] The district court found that the proposed decree, styled as a modification of an earlier consent decree,[5] would be procompetitive and therefore in the public interest. It specifically agreed with the position then espoused by the Justice Department that the information services restriction was "necessary" to prevent anticompetitive abuses and to permit effective competition in information services markets.[6] This Court summarily affirmed the district court's decision. *Maryland v. United States*, 460 U.S. 1001 (1983).

B. Proceedings to Modify the Line-of-Business Restrictions. Five years later, the BOCs, now supported by the

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[3] 552 F. Supp. at 140-43. As a formal matter, the settlement was implemented as a "modification" of the 1956 consent decree. Hence, the order ultimately entered by the district court was termed a "Modification of Final Judgment," sometimes referred to as the "MFJ." 552 F. Supp. at 141 n.31.

[4] 15 U.S.C. § 16(e); App. 127a. The district court decided to apply Tunney Act procedures and standards to what was, in form, a "modification" of an earlier decree. 552 F. Supp. at 145.

[5] *See* n.3, *supra*.

[6] 552 F. Supp. at 189; Brief for Appellee United States of America, at 19-20, No. 91-5263 (D.C. Cir. filed Oct. 5, 1992).

Department because of a reversal of its prior position, petitioned for removal of the information services restriction. Numerous intervenors opposed removal. After an extensive proceeding, the district court found that the petitioning BOCs had failed to satisfy their burden under the terms of the decree to show there was "no substantial possibility" that the BOCs could use their monopoly power to impede competition in the information services market. *United States v. Western Elec. Co.*, 673 F. Supp. 525, 565 (D.D.C. 1987).[7]

C. The Initial Decision of the Court of Appeals. On appeal, the D.C. Circuit vacated and remanded, concluding that the district court erred in analyzing the petitions under the "no substantial possibility" standard built into the decree. The D.C. Circuit concluded that the district court should have applied a different standard of review because none of the original parties to the decree had opposed the petitions. *United States v. Western Elec. Co.*, 900 F.2d 283, 305-07, 309 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 283 (1990); App. 113a-117a, 121a.

The court of appeals directed the district court on remand to review the petitions under a general "public interest" standard derived from the Tunney Act and the common law.[8] The court ruled that such a standard was

[7] Section VIII(C) of the decree permits removal or modification of the line-of-business restrictions only upon "a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." 552 F. Supp. at 231. The court did modify the information services restriction to permit BOCs to offer "information service gateways" and certain other information services, and it vacated the decree's restriction against "non-natural monopoly" services. 673 F. Supp. at 597, 599.

[8] *See* 900 F.2d at 295 (modification should be approved under Section VII "so long as [it] satisf[ies] the 'public interest' standard embodied in the Tunney Act"); App. 91a; 900 F.2d at 305, 306 (describing the "public interest" test as the "common law" test); App. 114a, 115a.

inherent in the decree's "Retention of Jurisdiction" clause (Section VII of the decree), and should derive its meaning from the antitrust laws. 900 F.2d at 291 n.6, 294-95, 306; App. 82a-83a, 90a-91a, 114a, 119a. Thus, a proposed modification would not be in the public interest if it would be anticompetitive. 900 F.2d at 308; App. 121a.

The court of appeals remanded to enable the district court to make "*de novo*" findings of fact under this public interest test. 900 F.2d at 308-09; App. 120a-121a. On remand, the court was to determine "whether removal of the information-services restriction as applied to the generation of information would be anticompetitive under *present* market conditions." 900 F.2d at 309; App. 121a. The court of appeals also observed that "the appropriate question under section VII is whether the proposed modification would be *certain* to lessen competiton in the relevant market." 900 F.2d at 308 (emphasis added; citation omitted); App. 119a.

Numerous intervenors filed a petition for certiorari.[9] The government and the BOCs opposed the petition, arguing, *inter alia*, that because the case had been remanded, the petition was premature.[10] The petition was denied. 111 S. Ct. 283 (1990).

D. Remand Proceedings Before the District Court. The BOCs again petitioned to remove the information services restriction and submitted evidence in support of their petition. A broad range of intervenors opposed elimination of the restriction.[11] They submitted evidence

[9] Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, *MCI Communications Corp. v. United States* (No. 90-9, June 28, 1990).

[10] *See* n.38, *infra*.

[11] These included the Consumer Federation of America, Wisconsin Citizens' Utility Board, Toward Utility Rate Normalization, the New York State Department of Public Service, and the Public Service Commission of the District of Columbia. These groups

from "very distinguished economists," 993 F.2d at 1578, 1581, 1582; App. 15a, 21a, 23a, and technical witnesses, as well as documentary evidence, to demonstrate that the proposed modification would be anticompetitive and therefore contrary to the public interest.[12] The Department submitted no new evidence.[13] The Department and the BOCs argued that the D.C. Circuit's opinion required the district court to accept the Department's conclusion that the proposed modification would be procompetitive unless the court was "certain" the modification would lessen competition.[14]

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had formal intervenor status. *E.g., United States v. Western Elec. Co.* (D.D.C. Sept. 28, 1990).

[12] The evidence demonstrated that, as regulated monopolists, BOCs had opportunities and incentives to injure competition in information services markets through discriminatory conduct that limited the range of services competitors could offer or raised competitors' costs for those services; that BOCs have the ability and incentive (through cost-shifting) to engage in strategic predation that would limit consumer choice; and that these strategies would succeed even against large firm competitors. *E.g.*, Declaration of Robert E. Hall, at 2-4, 28-30, 36-37 (D.C. Cir. J.A. 2153-55, 2179-81, 2187-88); Affidavit of Roger G. Noll, ¶¶ 29-33 (D.C. Cir. J.A. 2591-93); Affidavit of Carl Shapiro, ¶¶ 37, 41-45, 53-54, 66 (D.C. Cir. J.A. 2662-64, 2668, 2670); Affidavit of Robert A. Mercer, ¶¶ 12-22 (D.C. Cir. J.A. 2530-36); Affidavit of John E. Kwoka, Jr., ¶¶ 44-49 (D.C. Cir. J.A. 2452-53).

[13] *See* 767 F. Supp. at 313; App. 32a.

[14] BOC Mem. at 3, 4 (filed D.D.C. Aug. 17, 1990); BOC Reply at 11 (filed Jan. 15, 1991); DOJ Reply at 7 (filed Jan. 18, 1991) (court of appeals' opinion contained a "clear articulation of a certainty standard"). The BOCs argued that "no amount of discovery or trial testimony would permit the [district c]ourt to upset [the Department's] reasoned evaluation of the competitive risks and benefits of [BOC] entry." BOC Reply at 86-87. Nevertheless, the BOCs submitted extensive reply affidavits. On the subsequent appeal, the D.C. Circuit relied almost exclusively on those untested reply affidavits to support its conclusion that the Department's previously formed views concerning the competitive impact of removing the restriction were supportable by substantial evidence. *See* 993 F.2d at 1578-81; App. 15a-21a.

E. The Decision of the District Court on Remand. After weighing the competing evidence and hearing argument, the district court found that because BOCs control the local telephone access essential to connect information service providers to their customers, they have the ability "to exercise market power with respect to information services markets, that is, to raise price, to restrict output, or both." *United States v. Western Elec. Co.*, 767 F. Supp. 308, 315 (D.D.C. 1991); App. 35a-37a. The court also found that neither federal nor state regulation can be expected to prevent anticompetitive activities by the BOCs. 767 F. Supp. at 318-22; App. 42a-52a. Because of the limited effectiveness of regulatory oversight of their telephone rates, the BOCs could engage in strategic predation, shifting costs to subsidize their competitive information services with monopoly service revenues. 767 F. Supp. at 324-25; App. 56a-58a. Moreover, the court found that in the few information services markets BOCs were permitted to enter since divestiture, they had used their local exchange monopolies to engage in anticompetitive conduct. 767 F. Supp. at 322-24; App. 52a-55a.

In light of these findings, the district court concluded that "*the most probable consequence*[] of . . . entry by the [BOCs] into the sensitive information services market will be the elimination of competition from that market." 767 F. Supp. at 326 (emphasis added); App. 61a. Finding that "it would be difficult to conceive of a step that would be less in the public interest," 767 F. Supp. at 327; App. 62a, the district court nevertheless accepted the argument that the decision of the court of appeals left it "no choice" but to defer to the Department's current views. 767 F. Supp. at 330; App. 69a. Although the court found that entry of the BOCs into the information services market would be anticompetitive, the court could not be "certain" of these effects, as it believed the court of appeals required. The court therefore modified the

decree to remove the restriction. 767 F. Supp. at 331; App. 71a.[15]

F. The Second Decision of the Court of Appeals. Petitioners appealed, arguing that a "certainty" standard was unprecedented and incompatible with the Tunney Act. The D.C. Circuit agreed, but affirmed on a different ground. Although that court had stated in four decisions subsequent to its first decision that the question to be decided under Section VII of the decree was whether an uncontested modification would be "certain" to lessen competition,[16] and although the Department and the BOCs had cited its earlier opinion as establishing a "certainty" standard, the court of appeals dismissed the argument that it had imposed such a standard as a "straw man." 993 F.2d at 1576; App. 11a. The court acknowledged that a certainty standard "would extinguish Tunney Act review." *Id.*

Instead, the court of appeals formulated yet another standard. Having initially remanded for a "*de novo* assessment of the evidence" and "further factfinding" to determine whether removal of the information services restriction would be anticompetitive, 900 F.2d at 308, 309; App. 120a, 121a, it now held that the district court should simply have determined whether the Department's

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[15] The district court stayed its decision pending appeal because of its doubts about applying a "certainty" standard. 767 F. Supp. at 332-33; App. 73a-75a. The D.C. Circuit vacated the stay. *United States v. Western Elec. Co.*, 1991-2 Trade Cas. (CCH) ¶ 69,610 (D.C. Cir. Oct. 7, 1991). Petitioners applied to this Court for a stay, which was denied. *American Newspaper Publishers Ass'n v. United States*, 112 S. Ct. 366 (1991).

[16] *United States v. Western Elec. Co.*, 1992 U.S. App. LEXIS 33009 (D.C. Cir. Nov. 5, 1992); *United States v. Western Elec. Co.*, 969 F.2d 1231, 1232, 1235 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1363 (1993); *United States v. Western Elec. Co.*, 1991 U.S. App. LEXIS 33013 (D.C. Cir. Dec. 4, 1991); *United States v. Western Elec. Co.*, 907 F.2d 1205, 1210 (D.C. Cir. 1990).

views were "reasonable" and had "substantial factual support." 993 F.2d at 1578, 1581; App. 15a, 21a. The court characterized the district court's role in reviewing consensual modifications as "secondary," "limited," and "deferential." 993 F.2d at 1577, 1578; App. 12a, 15a.

The court did not remand for application of this new test. Instead, assuming a role it described as akin to that of a court reviewing agency action under the Administrative Procedure Act, the court of appeals decided that remand was unnecessary because it could itself determine that the Department's views regarding competitive impact were not unreasonable and were therefore binding on the district court. 993 F.2d at 1578, 1581-82; App. 14a, 21a-23a.

The court of appeals acknowledged that "the distinguished experts" who concluded that the modification would be anticompetitive might be "right," 993 F.2d at 1582; App. 23a, but ruled that the district court should not have made an independent judicial determination regarding competitive impact: "It is not, however, for us [*i.e.*, courts] to choose among the opposing positions of distinguished economists. The issue is whether the Department of Justice's position had substantial factual support and was grounded in reasonable analysis." 993 F.2d at 1581; App. 21a.

REASONS FOR GRANTING THE WRIT

The D.C. Circuit has established an erroneous and broadly applicable standard for entry and modification of consent decrees. The standard dangerously cedes to the Department of Justice, acting in its prosecutorial capacity, effective control over judicial orders by commanding judicial acceptance of any "reasonable" view the Department adopts on critical factual issues such as the likely impact on competition of a proposed decree. That standard squarely violates the Tunney Act, which requires

independent judicial determination of such factual questions. *See* Point I. It also squarely conflicts with the Second Circuit's decision in *United States v. American Cyanamid Co.*[17] *See* Point II.

The decision below will have vast practical importance. It subjects one of the nation's most vital industries to a market structure found to be anticompetitive by the one court to have independently considered the evidence. Moreover, most of the antitrust cases brought by the Department result in consent decrees,[18] and nearly all of those decrees contain the standard "retention of jurisdiction" clause from which the D.C. Circuit's deferential standard is derived.[19] Thus, if unresolved, the conflict between the D.C. Circuit's rule, on the one hand, and the Tunney Act and Second Circuit authority, on the other, will have a major impact on the administration of the antitrust laws in many industries. Resolution of these questions is particularly important because the Tunney Act represents a deliberate choice by Congress regarding the proper allocation between the Judicial and Executive branches of the authority to determine the public interest. Few questions are more important or more worthy of review than those regarding the allocation of power between coordinate branches of government.

Moreover, the D.C. Circuit's new rule applies beyond the antitrust context. The court of appeals equated its "public interest" test with the common law test, 900 F.2d

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[17] 719 F.2d 558 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984).

[18] *The Antitrust Procedures and Penalties Act: Hearings on S. 782 & S. 1088 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 2 (1973).

[19] Antitrust Division Manual, Consent Decree Standard Provisions, IV-76 (1987); App. 126a; 7 Trade Reg. Rep. (CCH) ¶¶ 50,701 to 50,747 (1993) (text of recent decrees).

at 305, 306; App. 114a, 115a, which courts apply to the entry and modification of consent decrees in such diverse areas as environmental and civil rights law. The D.C. Circuit's standard thus requires courts administering a broad range of consent decrees to enter, vacate, or modify their own orders whenever the Justice Department changes positions (from one "reasonable" view to a different or even opposite "reasonable" view), even when the change is based on *factual* assessments typically made by courts. *See* Point II.

Finally, the important questions presented above could have been avoided had the D.C. Circuit not erroneously substituted the more general "public interest" test for the specific standard for modification contained in the decree. Point III.

I. THE D.C. CIRCUIT RULE VIOLATES THE TUNNEY ACT BY PROHIBITING COURTS FROM MAKING INDEPENDENT JUDICIAL FINDINGS WHEN DECIDING WHETHER TO ENTER CONSENT DECREE PROPOSALS.

The Tunney Act *forbids* a district court from entering a decree it finds will be anticompetitive: "Before entering any consent judgment proposed by the United States under this section, the *court* shall determine that the entry of such judgment is in the public interest." 15 U.S.C. § 16(e) (emphasis added).[20] As the D.C. Circuit held,

[20] The decisions below applied the Tunney Act because the court and the parties assumed the Act applies to decree modifications as well as to the initial entry of decrees. 993 F.2d at 1576; 900 F.2d at 295; App. 10a, 91a. As the United States recognizes, "It is well established that when the government and antitrust defendants agree to modify or remove a restriction from a consent decree, the courts apply the common law 'public interest' standard, which also governs judicial review of proposed consent decrees under the [Tunney Act]." United States Opposition to Application of ANPA, et al., for a Stay Pending Appeal of the District Court's Information Services Ruling (S. Ct. filed Oct. 1991), at 9-10.

If the Tunney Act were not applicable to consent decree modifications that changed the substantive rights and obligations of the

and all parties acknowledge, in the antitrust context "in the public interest" means procompetitive. 900 F.2d at 309; App. 121a. Thus, the Tunney Act requires the court to determine whether a consent decree proposal is procompetitive. The Act deals expressly with the court's consideration of the Department's views. In mandating the court's determination whether a proposal will be procompetitive, the Act makes consideration of the Department's views discretionary. The court "may" consider testimony of government officials, authorize participation by government agencies, and consider the response of the United States to public comments—but it is not required to do so. 15 U.S.C. § 16(f).

The D.C. Circuit has reversed this statutory command by *requiring* entry of decrees endorsed by the Department if the Department's views are "reasonable" and have "substantial factual support." 993 F.2d at 1577-78, 1581; App. 12a-14a, 21a; *see also* 993 F.2d at 1577 ("the interesting question is not why courts should allow modification, but why they should consider upsetting it"); App. 13a. Under this standard, the Department's views must not only be considered, but are likely to be *controlling*. The consequence of this inversion of Congress' command is that in cases where there is substantial factual support on both sides, entry of a proposal supported by the Department is required *even if, as here, the district court*

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parties, parties could avoid the judicial scrutiny required by the Act by agreeing to dissolve or modify substantive provisions of the decree shortly after court approval. *See* Note, *Construction and Modification of Consent Decrees: New Approaches After the Antitrust Procedures and Penalties Act of 1974*, 77 Colum. L. Rev. 296, 312-13 (1977) ("provisions for public scrutiny of consent decrees would plainly be thwarted were the parties able to accomplish by modification what they would be unwilling to disclose in the original decree"). In any event, the court of appeals explicitly applied and construed the Tunney Act standard, and therefore its decision will control consideration of original consent decrees as well as consensual modifications.

determines that the proposal would be anticompetitive.[21] Thus, the ruling below directs district courts to ignore the clear commands of the Tunney Act. That ruling was outcome determinative.[22]

The court of appeals made no effort to reconcile its standard with the text and manifest purpose of the Tunney Act. Instead, the court relied on an inapt and largely unexplained analogy to principles of administrative law that require affirmance of certain agency "final action" if there is "substantial evidence" supporting the agency's decision—even if the court, acting independently, would have reached a different result. 993 F.2d at 1577-78; App. 12a-14a; 993 F.2d at 1581; App. 21a ("It is not, however, for us to choose among the opposing positions of distinguished economists."). Thus, if the government's views were "reasonable," but wrong, the D.C. Circuit rule would require district courts to approve the proposal.[23]

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[21] 993 F.2d at 1576; App. 10a ("[I]t was not up to the [district] court to reject an agreed-on change simply because the proposal diverged from *its* view of the public interest.").

[22] The district court had independently found that allowing the modification would eliminate competition and therefore would be contrary to the public interest. 767 F. Supp. at 315-27; App. 35a-62a. The court of appeals did not rule that those findings were clearly erroneous. It simply held that the district court should not have made independent findings and that there was substantial factual support for the Department's position. 993 F.2d at 1581-82; App. 21a-23a. Indeed, the court recognized that "[t]he distinguished experts marshalled by the appellants may . . . be 'right.'" 993 F.2d at 1582; App. 23a.

[23] Under the substantial evidence test, an agency's judgment supported by substantial evidence is conclusive even if it is "factually questionable" and even if the opposite conclusion is *more* reasonable. *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 477-78 (1947). Indeed, the purpose of the substantial evidence test is to "free[] the reviewing courts of the time-consuming and difficult task of weighing the evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619-21 (1966); *NLRB v. Nevada*

Had Congress intended to require judicial approval of a proposed decree or modification whenever there was substantial factual support for the Department's position, it could easily have said so. Congress has vast experience creating standards and procedures for judicial review of agency decisionmaking. When Congress intends to give independent legal force to an agency's findings, and to require deferential review of those findings, it does so explicitly.[24] But Congress has not delegated *agency powers* to the Department under the antitrust laws. As the court of appeals recognized in its first decision, the Department functions as a prosecutor and does not make decisions with "independent legal significance." 900 F.2d at 297; App. 96a. Congress did not establish the Department's litigating position as "final agency action" with independent legal significance, did not impose substantial evidence review, and did not provide any of the safeguards and procedures for establishing an agency "record" to review.[25]

Consol. Copper Corp., 316 U.S. 105, 106-07 (1942) (same). Thus, "[i]t is a basic maxim of federal administrative law that a court reviewing an agency's determinations cannot engage in independent fact finding." *Thomas v. County Office Comm.*, 327 F. Supp. 1244, 1256 (S.D. Tex. 1971) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951)). None of these formulations of the substantial evidence test can be squared with the Tunney Act's requirement that a decree cannot be entered unless the court determines, after receiving all evidence it deems appropriate, that the government is *right* that the decree will be in the public interest.

[24] *E.g.*, 28 U.S.C. § 2342(1); 47 U.S.C. § 402; 5 U.S.C. § 706(2)(E). Similarly, when Congress intends to vest an agency with authority to determine the "public interest," it does so explicitly. *See, e.g.*, 47 U.S.C. § 309(a) (FCC must determine whether "public interest, convenience, and necessity will be served"); 47 U.S.C. § 201 (FCC must make public interest determination); 49 U.S.C. § 10922(c) (ICC makes public interest determination); 15 U.S.C. § 717f (FERC must decide whether action is "necessary or desirable in the public interest").

[25] *Compare* 5 U.S.C. §§ 554, 556, 706(2)(E) (safeguards and procedures for formal adjudication subject to substantial evidence

The legislative history confirms what the text of the Tunney Act makes clear: Congress did not intend to establish deferential APA-type review. Congress sought through the Tunney Act to end judicial "rubber stamping" by requiring courts to make "independent determination[s]" regarding the public interest.[26] It did so out of suspicion that the Department had bowed to industry pressures and had accepted ineffective decrees—specifically citing as an example the 1956 Bell System decree.[27] The decision below reverses the congressional requirement of independent judicial factfinding by explicitly relegating courts to the "secondary" and "limited" role of determining only whether the Department acted reasonably. 993 F.2d at 1577, 1578, 1581-82; App. 12a, 15a, 21a-23a.

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review). Thus, in *United States v. Ottati & Goss, Inc.*, 900 F.2d 429, 434 (1st Cir. 1990), the court recognized that where Congress mandates a "public interest" standard but makes no provision for "final agency action" or deferential review, the "public interest" test "impl[ies] *court-selected*, not agency-selected standards." As here, the statutory provision at issue in *Ottati* "nowhere uses the words 'arbitrary,' or 'capricious' or any other word implying court *review* of an agency decision, the context in which those *reviewing* standards typically govern." *Id.*

[26] *E.g.*, S. Rep. No. 298, 93d Cong., 1st Sess. 5 (1973); H.R. Rep. No. 93-1463, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 6535, 6538; *The Antitrust Procedures and Penalties Act: Hearings on S. 782 & S. 1088 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 3 (1973); 119 Cong. Rec. 24,597-98 (1973) (Act requires "independent judgment" by courts) (statement of Sen. Tunney).

[27] *See* n.2, *supra; see also* 552 F. Supp. at 136-38, 149 & n.75 (citations omitted); H.R. Rep. No. 93-1463, at 3, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Admin. News 6535, 6537. This underlying congressional concern applies with particular force here because Department officials adopted "precisely . . . [the] opposite" position from that of their predecessors regarding the competitive impact of BOC provision of information services. *See* 767 F. Supp. at 330 n.115; App. 69a. The court of appeals recognized in its first opinion that the district court's skepticism of the Department's change of views was justified. 900 F.2d at 298.

The Court of Appeals, citing language in other lower court decisions, observed that a proposed decree need only be within "the reaches" of the public interest. 993 F.2d at 1576; App. 10a. But that phrase, which appears nowhere in the Tunney Act, cannot support the deferential standard adopted by the D.C. Circuit to govern the central *factual* question whether a decree proposal would be anticompetitive. The phrase merely expresses the concept that more than one decree approach may be procompetitive and thus within the reaches of the public interest. The district court here did not reject a proposal it thought would be procompetitive in favor of a more procompetitive proposal. Instead, it found the proposal would be anticompetitive. The Tunney Act requires courts to determine whether decree proposals will be procompetitive and thus within the public interest. The court of appeals' ruling requires courts to ignore that clear congressional command.[28]

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[28] Because the "public interest" inquiry as applied to an antitrust decree proposal involves a factual inquiry into the effect of the proposal on competition, this case does not implicate the concerns of Chief Justice Rehnquist in dissenting from summary affirmance in *Maryland v. United States*, 460 U.S. 1001, 1004 (1983), that the "public interest" is too ill-defined for judicial resolution. The determination of *competitive impact* is a question of fact routinely determined by courts in antitrust litigation. *See, e.g., United States v. Baker Hughes, Inc.*, 908 F.2d 981 (D.C. Cir. 1990) (Thomas, J.); *United States v. BNS, Inc.*, 858 F.2d 456, 463-64 (9th Cir. 1988); *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1192 (8th Cir. 1982); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 270-71 (7th Cir. 1981), *cert. denied*, 455 U.S. 921 (1982); *United States v. Empire Gas Corp.*, 537 F.2d 296, 308 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977).

Although in original decrees (as opposed to modifications) it might be appropriate to afford deference to the Executive on questions such as the risk of proceeding to trial if a case is not settled, the Court should clarify for lower courts that it would be inappropriate to require similar deference to the Executive on the threshold *factual* question of whether an antitrust decree or modification will be procompetitive.

II. THERE IS A SQUARE CONFLICT BETWEEN THE D.C. CIRCUIT AND THE SECOND CIRCUIT REGARDING THE DEFERENCE OWED TO THE DEPARTMENT OF JUSTICE IN JUDICIAL PROCEEDINGS TO ENTER OR MODIFY ANTITRUST CONSENT DECREES.

The Second Circuit and the D.C. Circuit sharply disagree regarding the extent to which courts must defer to Justice Department views regarding the competitive impact of proposed antitrust consent decrees or decree modifications. In *United States v. American Cyanamid Co.*, 719 F.2d 558 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984), the Second Circuit reversed a district court decision that gave "great weight" to the Department's views, and directed the district court on remand to make its own "findings of fact." 719 F.2d at 567. The decision below, by contrast, required the district court to give *conclusive* weight to the Department's views so long as there was substantial evidence to support them. 993 F.2d at 1578, 1581; App. 14a-15a; 21a.

The conflict between *Cyanamid* and the decision below is striking. Both involved an intervenor's appeal of an order granting a motion to terminate provisions of an antitrust consent decree. Like the decree at issue here, the decree in *Cyanamid* was intended to "nullify any tendency which [the defendant] . . . would have to lessen competition." 719 F.2d at 565; 552 F. Supp. at 186-91. In both *Cyanamid* and this case the district court applied a "public interest" test that derived its meaning from the antitrust laws. *See* pages 6-8 above; 719 F.2d at 565. Finally, in both cases the district court took evidence and heard the views of intervenors, but ultimately deferred to the Department's views. See pages 6-8 above; 719 F.2d at 567 (district court gave "great weight" to the Department's views and determined that the Department had not "abused its discretion").

The similarity ends there. The Second Circuit rejected the deferential "abuse of discretion" standard the district

court had applied, reversed the district court's decision to defer to the Department's views, and remanded for independent findings of fact by the district court. 719 F.2d at 566-67.

The deferential "substantial evidence" test that the D.C. Circuit adopted is indistinguishable from the "abuse of discretion" test that the Second Circuit rejected in *Cyanamid*.[29] Indeed, in its brief to this Court in *Cyanamid*, the United States listed as one of the questions presented whether the Second Circuit erred in *not* deferring to the "reasoned judgment of the United States that termination of the decree would be in the public interest as defined by the antitrust laws."[30] The standard the United States unsuccessfully urged in *Cyanamid* is precisely the standard adopted by the D.C. Circuit here.

Although the Court has thought it important to clarify the standard for reviewing *contested* consent decree proposals,[31] it has never addressed the standard for reviewing

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[29] In the context of judicial review of an agency's factual findings, courts interpret the arbitrary-and-capricious/abuse-of-discretion standard as the equivalent of a substantial-evidence standard. *See Association of Data Processing v. Board of Governors*, 745 F.2d 677, 683-85 (D.C. Cir. 1984) (Scalia, J.) (distinction between two standards is "largely semantic"); *Central States Enters. v. ICC*, 780 F.2d 664, 674 n.10 (7th Cir. 1985) (same); *Associated Indus. v. Department of Labor*, 487 F.2d 342, 349-50 (2d Cir. 1973) (same); *Roadway Express v. NLRB*, 647 F.2d 415, 424 & n.17 (4th Cir. 1981) (substantial evidence standard yields same result as abuse-of-discretion standard).

[30] Brief for the United States on Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, *American Cyanamid Co. v. Melamine Chemicals, Inc.*, No. 83-1085 (Jan. 25, 1984), at (I). *See also* Axinn & Stoll, *U.S. v. American Cyanamid—Consent Decree Modification Standards*, 190 N.Y.L.J. 93 (1983) 1, col. 1, at 30, col. 3 ("After *American Cyanamid*, this determination [whether to approve a consented termination of a decree] must be made by the court *independent of government assertions and assurances*") (emphasis added).

[31] *See, e.g., Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748 (1992).

uncontested proposals. There is substantial confusion among lower courts as to their proper role, and the role of the Executive, in determining under the common law and the Tunney Act whether an uncontested decree proposal is consistent with the public interest. Thus, for example, in analyzing an uncontested proposal to terminate an antitrust consent decree, the court in *United States v. Jas. H. Matthews & Co.*, 1989-1 Trade Cas. (CCH) ¶ 68,441 (W.D. Pa. 1989), made detailed, independent findings of fact as to the likely effect on competition of terminating the decree. Following the Second Circuit's decision in *Cyanamid*, the *Matthews* court refused to apply a highly deferential standard that would inquire only into the government's good faith. 1989-1 Trade Cas. at 60,434. Instead, the court held that while a "degree of deference" is due the Department, ultimately it is the court that must decide whether termination would be anticompetitive and therefore inconsistent with the public interest. *Id.* In contrast, in *United States v. National Finance Adjusters*, 1985-2 Trade Cas. (CCH) ¶ 66,856 (E.D. Mich. 1985), the court applied an "abuse of discretion" standard and approved an uncontested modification on the ground that the Department's views had "some support in economic theory and in the facts of this case." 1985-2 Trade Cas. at 64,248.[32]

Moreover, resolution of this widespread confusion will have far-reaching effects beyond the antitrust arena, because the D.C. Circuit equates the Tunney Act "public interest" test with the test applied at common law.[33] Un-

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[32] *See also United States v. Associated Milk Producers*, 534 F.2d 113, 118 (8th Cir.), *cert. denied*, 429 U.S. 940 (1976) (denial of intervention upheld because government acted in good faith and "adequately protect[ed] the public interest" in accepting consent decree). Still other courts claim to defer to the Department, but nonetheless undertake an independent review of the public interest. *E.g.*, *United States v. Yoder Bros.*, 1989-2 Trade Cas. (CCH) ¶ 68,723 at 61,795 (N.D. Ohio 1989).

[33] *See* 900 F.2d at 306 (uncontested motions are to be governed by "common law principles pursuant to section VII"); App. 115a.

der traditional common law principles, courts have inherent power to refuse to enter decrees or modifications they find contrary to the public interest,[34] because entry or modification of a consent decree is not a mere recording of a private agreement, but a judicial act resulting in an order with the force of law.[35]

The common law public interest test is applied to decrees in diverse areas, including civil rights and environmental law, where courts routinely make independent factual determinations as to the need for and effectiveness of proposed decrees.[36] Indeed, the standard "retention of jurisdiction" clause from which the D.C. Circuit's public interest test is purportedly derived is also found in the "model consent decree" the EPA has used in hundreds of cases.[37]

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[34] *See, e.g., United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932); *Cyanamid*, 719 F.2d at 565; *see also* U.S. Brief as Amicus Curiae, at 10, in *Rufo v. Inmates of Suffolk County Jail*, Nos. 90-954 & 90-1004 (S. Ct., filed April 15, 1991) ("[A] federal court is more than 'a recorder of contracts' from whom parties can purchase injunctions") (citing *Local 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501, 525 (1986)). The "public interest" inquiry is not open-ended, but "take[s] meaning from the purposes of the regulatory legislation" at issue. *NAACP v. FPC*, 425 U.S. 662, 669 (1976), *cited in Cyanamid*, 719 F.2d at 565.

[35] *See, e.g., Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 757 (1992); *Local Number 93 v. Cleveland*, 478 U.S. 501, 519 (1986); *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235-37 (1975); *Pope v. United States*, 323 U.S. 1, 12 (1944); *United States v. Swift & Co.*, 286 U.S. 106, 114-17 (1932).

[36] *See, e.g., Kasper v. Board of Election Comm'rs*, 814 F.2d 332, 338-39 (7th Cir. 1987); *Armstrong v. Board of School Directors*, 616 F.2d 305, 315 (7th Cir. 1980); *United States v. Conservation Chem. Co.*, 628 F. Supp. 391, 400 (W.D. Mo. 1985); *EEOC v. Pan American World Airways*, 622 F. Supp. 633 (N.D. Cal. 1985), *app. dism.*, 796 F.2d 314 (9th Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987); *United States v. Seymour Recycling Co.*, 554 F. Supp. 1334, 1337-38 (S.D. Ind. 1982); *United States v. Hooker Chems.*, 540 F. Supp. 1067, 1072-79 (W.D.N.Y. 1982).

[37] *See* 56 Fed. Reg. 30996, 31011 (July 8, 1991).

The Court should therefore clarify for lower courts whether deference is owed the Executive on the factual questions that determine whether an uncontested decree or modification is consistent with the underlying substantive laws—in an antitrust case, whether the proposal will be anticompetitive—even when there is more persuasive evidence contradicting the Executive's views. The Court should rule that deference to the Executive on those questions is not appropriate.

III. THE D.C. CIRCUIT'S REFUSAL TO REVIEW THE PROPOSED MODIFICATION UNDER THE EXPLICIT STANDARD DRAFTED BY THE DISTRICT COURT AND CONSISTENTLY USED BY THE PARTIES IS INCONSISTENT WITH A PRIOR DECISION OF THIS COURT, WITH DECISIONS IN OTHER CIRCUITS, AND WITH SOUND ADMINISTRATION OF CONSENT DECREES.

The D.C. Circuit would not even have reached the issue of the common-law Tunney Act standard for decree modifications if it had not committed a threshold error. That error was to reject the specific "no substantial possibility" test for reviewing modification requests prescribed in Section VIII(C) of the decree, and to substitute the more general "public interest" test.[38] By substituting a more general test, the court of appeals ignored the decree's express language and undermined the intent of the parties and the district court.

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[38] In 1990, petitioners unsuccessfully sought review in this Court of the question whether the explicit decree test or the public interest test applies here. Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, *MCI Communications Corp. v. United States* (No. 90-9, June 28, 1990). Respondents opposed that petition, arguing that petitioners prematurely sought review of an interlocutory decision remanding for further fact-finding. Brief for the United States in Opposition, at 13-14 (No. 90-9, Sept. 1990); Brief in Opposition of Respondent Regional Bell Operating Companies, at 19-22 (No. 90-9, Sept. 7, 1990). That decision is now final.

As the BOCs have recognized, applying the D.C. Circuit's version of the general public interest test rather than Section VIII(C) is "frequently dispositive."[39] The court of appeals acknowledged that "[w]hether section VII or section VIII(C) governs an uncontested motion to modify [the line-of-business restrictions] is not a mere academic question." 900 F.2d at 306; App. 114a. Under Section VIII(C), the court is required to resolve factual disputes by making independent findings of fact. Thus, in evaluating the competitive impact of proposals under Section VIII(C), the D.C. Circuit has not deferred to the Department's views or limited review to the existence of "substantial factual support." *See* 900 F.2d at 302-03 (rejecting Department's views that removal of the BOCs' restriction on manufacturing would be procompetitive); App. 106a-110a. In this case, the D.C. Circuit did not suggest, even in *dicta*, that the proposed modification would satisfy the Section VIII(C) test, which requires the BOCs to show there is "no substantial possibility" that their entry into the information services market "could" lessen competition in that market.

The D.C. Circuit's supplanting of the Section VIII(C) test is flatly inconsistent with this Court's ruling in *United States v. Atlantic Refining Co.*, 360 U.S. 19 (1959). There, the Court ruled that appellate courts should defer to district court interpretations of consent decrees where, as here, the language of the decree "in its normal meaning" supports the district court's interpretation, where that interpretation "has been adhered to over many years by all the parties, including those government officials who drew up and administered the decree from the start," and where "the trial court concludes that this interpretation is in fact the one the parties intended." 360 U.S. at 23-24. Each of those factors is present here. Indeed,

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[39] Petition for a Writ of Certiorari, *Ameritech Corp. v. AT&T*, No. 92-848 (Nov. 16, 1992), at 15.

there are even stronger reasons for deferring to the district court interpretation here than in *Atlantic Refining*, because here the district court itself insisted upon and drafted the provision at issue.

First, the "normal meaning" of Section VIII(C)'s language supports the district court's application of that section to both contested and uncontested petitions. Section VIII(C)'s plain language extends to *any* petition to remove a line-of-business restriction. To reach a contrary result, the court of appeals seized on Section VIII(C)'s requirement of a "showing by a petitioning BOC," asserting that this language "appears to contemplate adversarial testing." 900 F.2d at 295, 306; App. 90a, 115a. However, both uncontested and contested modifications are triggered by petitions. The more natural reading of Section VIII(C), therefore, is that it applies to all modification petitions, whether or not contested by other parties or intervenors. Because all such petitions seek judicial relief, all require a "showing" that the requested relief would be in the public interest. Nothing in the language of Section VIII(C) suggests that the consent or opposition of any party has bearing on the applicability of the section's "no substantial possibility" standard.

Second, the D.C. Circuit ignored six years of history that flatly contradicted its strained distinction between contested and uncontested petitions. The petitions at issue here were originally filed by the BOCs and by the Department *under Section VIII(C)*. Indeed, in the years following entry of the decree, the BOCs filed well over 100 petitions to modify, remove or waive the decree's line-of-business restrictions under Section VIII(C).[40] The

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[40] In 1984, the district court ruled that *all* BOC requests for removal under Section VIII(C) should first be reviewed by the Department and then presented to the Court as a Department petition under Section VIII(C). *United States v. Western Elec. Co.*, 592 F. Supp. 846 (D.D.C. 1984), *appeal dismissed*, 777 F.2d 23 (D.C. Cir. 1985).

overwhelming majority were *not* contested by original parties to the decree, and many were not contested by intervenors. Whether contested or not, these petitions were evaluated—without objection by the Department or the BOCs—under Section VIII(C).[41] The D.C. Circuit accorded no significance to this consistent practice, even though *Atlantic Refining* establishes that such a practice is powerful evidence of how a consent decree should be interpreted. 360 U.S. at 23-24.

Third, the D.C. Circuit cavalierly rejected the district court's conclusion that "in fact" Section VIII(C) was intended to govern *all* requests to remove line-of-business restrictions. 673 F. Supp. at 532-35. The D.C. Circuit erred in failing to treat the district court's conclusion about the intent of the parties as a factual finding, and compounded the error by expressly declining to give *any* deference to the district court's views, even though the district court drafted Section VIII(C), incorporated it as a condition of entry of the decree, and interpreted it repeatedly and consistently during administration of the decree. 900 F.2d at 294; App. 89a.

As the D.C. Circuit was forced to acknowledge, its refusal to give any deference to the findings of the district court was inconsistent with decisions in other circuits. 900 F.2d at 294; App. 89a. For example, one representative case, acknowledged in the decision below (900 F.2d at 294; App. 89a), recognized "the district

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[41] In the proceeding at issue here, AT&T took no formal position on the petitions to remove the information services restriction, but stated that wholesale elimination of the restriction was not warranted. Transcript of district court hearing, July 1, 1987, at 315; AT&T's Comments on the Report and Recommendations of the United States, at 111 (filed March 13, 1987). The Department argued that the "no substantial possibility" test of Section VIII(C) had been met. It did not argue that Section VII or any other test should govern. Transcript of Oral Argument, at 25 (D.C. Cir. Dec. 6, 1989); *see generally id.* at 24-29.

court's extensive experience with the case and the decree" and therefore required "special deference to its conclusions about the meaning of the decree." *Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986) (citation omitted).[42] Similarly, appellate courts routinely accord substantial deference to a district court's interpretation of its own orders,[43] and consent decrees are judicial orders.

The D.C. Circuit's indifference to the decree's plain language, the long-standing and consistent practice of the parties, and the trial court's finding as to the parties' intentions, is flatly inconsistent with this Court's decision in *Atlantic Refining* and with decisions in other circuits. The D.C. Circuit's ruling frustrates the policies of clarity and certainty that the inclusion of a provision like Section VIII(C) is designed to serve. Settlement of cases by consent decree will be sharply deterred if the parties cannot rely on the plain, intended, and settled meaning of decree provisions.

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[42] *See also Ferrell v. Pierce*, 743 F.2d 454, 461 (7th Cir. 1984) (district court's "views on interpretation [of a consent decree] are entitled to deference") (citation omitted); *United States v. Board of Educ.*, 717 F.2d 378, 382 (7th Cir. 1983); *AMF, Inc. v. Jewett*, 711 F.2d 1096, 1102 (1st Cir. 1983) (deference to district court's interpretation is due when the meaning of a consent decree is "fairly open to debate"); *Brown v. Neeb*, 644 F.2d 551, 558 n.12 (6th Cir. 1981) (district court's interpretation of a consent decree "deserve[s] deference" because "[f]ew persons are in a better position to understand the meaning of a consent decree than the district judge who oversaw and approved it."); *cf. South v. Rowe*, 759 F.2d 610, 613 n.4 (7th Cir. 1985).

[43] *See In re Chicago, Rock Island & Pac. R.R. Co.*, 865 F.2d 807, 810 (7th Cir. 1988); *In re Chicago, Milwaukee, St. Paul & Pac. R.R. Co.*, 784 F.2d 831, 834-35 (7th Cir. 1986); *Vaughns v. Board of Educ.*, 758 F.2d 983, 989 (4th Cir. 1985); *In re Fine Paper Antitrust Litigation*, 695 F.2d 494, 498 (3d Cir. 1982); *In re Penn Central Transp. Co.*, 486 F.2d 519, 531 (3d Cir. 1973), *cert. denied*, 415 U.S. 990 (1974).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 1, 1992 Decided May 28, 1993

No. 91-5263

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, *et al.*,
NATIONAL ASSOCIATION OF BROADCASTERS,
Appellants

No. 91-5264

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, *et al.*,
CONSUMER FEDERATION OF AMERICA,
Appellants

No. 91-5265

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
COMPUSERVE INCORPORATED,
Appellants

No. 91-5266

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
THE DUN & BRADSTREET CORPORATION,
Appellants

No. 91-5267

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
MCI COMMUNICATIONS CORPORATION,
Appellants

No. 91-5268

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
Appellants

No. 91-5269

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
NEWSPAPER ASSOCIATION OF AMERICA,
Appellants

No. 91-5270

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
PRODIGY SERVICES COMPANY,
Appellants

No. 91-5271

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
ADAPSO, THE COMPUTER SOFTWARE AND
SERVICES INDUSTRY ASSOCIATION, INC.,
Appellants

No. 91-5272

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
ALC COMMUNICATIONS CORPORATION,
Appellants

No. 91-5273

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
INFORMATION INDUSTRY ASSOCIATION,
Appellants

No. 91-5279

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, GE COMMUNICATIONS & SERVICES,

Appellants

No. 91-5280

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., AND AMERICAN TELEPHONE AND TELEGRAPH COMPANY, COX ENTERPRISES, INC.,

Appellants

No. 91-5281

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*, DIALOG INFORMATION SERVICES, INC.,

Appellants

No. 91-5282

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*, ASSOCIATION OF NORTH AMERICAN DIRECTORY PUBLISHERS, INC.,

Appellants

No. 91-5283

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
ALARM INDUSTRY COMMUNICATIONS COMMITTEE,
Appellants

No. 91-5284

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
WEST PUBLISHING COMPANY,
Appellants

No. 91-5285

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
LO-AD COMMUNICATIONS OF CALIFORNIA, INC.,
AND LO-AD COMMUNICATIONS OF NEVADA, INC.,
Appellants

No. 91-5286

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
MCGRAW-HILL, INC.,
Appellants

No. 91-5287

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
MEAD DATA CENTRAL, INC.,
Appellants

No. 91-5288

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
COMMERCE CLEARING HOUSE, INC.,
Appellants

Appeal from the United States District Court
for the District of Columbia

(C.A. 82-00192)

Chester T. Kamin, with whom *Bruce J. Ennis, Jr.*, *Michael H. Salsbury*, *Richard E. Wiley*, *Michael Yourshaw*, *William B. Baker*, *H. Bartow Farr, III*, and *Richard G. Taranto* were on the joint brief, for appellants. *Barbara L. Waite*, *Michael A. Jacobs*, *Ann J. LaFrance*, *Andrew D. Lipman*, *Richard M. Ridler*, *Jonathan W. Cuneo*, *Howard D. Polsky*, *Sue D. Blumenfeld*, *Robert P. Reznick*, *Werner K. Hartenberger*, *Laura H. Phillips*, *Alexander Humphrey*, *Robert J. Butler*, *Roy L. Morris*, *Joseph P. Markoski*, *W. Terry Maguire*, *Brenda L. Fox*, *Randolph J. May*, *Gene Kimmelman*, *Henry L. Baumann* also entered appearances for appellants.

Peter G. Wolfe entered an appearance for Public Service Commission of the District of Columbia.

Frank W. Lloyd, III entered an appearance for intervenor Leghorn Telepublishing Company.

John Glynn, Gary L. Lieber, and *Robert L. Duston* entered appearances for intervenor Maryland People's Counsel.

Nancy C. Garrison, Attorney, Department of Justice, with whom *Catherine G. O'Sullivan,* Attorney, Department of Justice was on the brief, for appellee United States of America.

Laurence H. Tribe, with whom *Stephen M. Shapiro, Michael K. Kellogg, Walter H. Alford, Mark K. Hallenbeck, Richard W. Odgers, Margaret deb. Brown, Jeffrey S. Bork, John Thorne, Raymond F. Burke, Gerald E. Murray, James D. Ellis, Liam S. Coonan, Ann E. Meuleman,* and *Martin E. Grambrow* were on the brief, for appellees Bell Operating Companies.

Phillip D. Mink entered an appearance for intervenor Action for Children's Television and Citizens for a Sound Economy Foundation.

Herbert E. Marks and *James L. Casserly* entered appearances for intervenor Independent Data Communication Manufacturers Association, Inc.

David W. Carpenter entered an appearance for intervenor American Telephone and Telegraph Company.

John W. Pettit and *Thomas K. Crowe* entered appearances for intervenor Tandy Corporation.

Laurence H. Tribe and *Michael K. Kellogg* entered appearances for intervenor Ameritech, Bell Atlantic, BellSouth Corporation, NYNEX Corporation, Pacific Telesis Group, Southwestern Bell and US WEST, Inc.

Kathleen F. O'Reilly entered an appearance for intervenor Wisconsin Citizens' Utility Board and Toward Utility Rate Normalization.

Phillip D. Mink was on the brief for intervenor and *amicus curiae* Regional Telephone Company.

Robert Abrams, John R. Perkins, Robert T. Stephen, and *Thomas Udall* were on the brief, for *amicus curiae* Twenty-Seven States.

Robert L. Pettit, General Counsel, *Renee Licht,* Deputy General Counsel, and *John E. Ingle,* Deputy Associate General Counsel, Federal Communications Commission were on the brief, for *amicus curiae* Federal Communications Commission.

Martin T. McCue, General Counsel, and *Rodney L. Joyce,* United States Telephone Association were on the brief, for *amicus curiae* United States Telephone Association.

James B. Gainer, Assistant Attorney General, entered an appearance for *amicus curiae* Public Utilities Commisison of Ohio, State of Ohio, Illinois Commerce Commission, and State of Illinois.

Steven M. Schur, General Counsel, and *Michael S. Varda,* Legal Counsel, Public Service Commission of Wisconsin, entered appearances for *amicus curiae* Public Service Commission of Wisconsin and State of Wisconsin.

L. Andrew Tollin entered an appearance for *amicus curiae* Media Institute.

Bruce J. Weston and *David C. Bergmann* entered appearances for *amicus curiae* National Association of State Utility Consumer Advocates and Office of the Consumers' Counsel State of Ohio.

Before: BUCKLEY, WILLIAMS and SENTELLE, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* STEPHEN F. WILLIAMS.

STEPHEN F. WILLIAMS, *Circuit Judge*: When the government and AT&T settled the government's antitrust suit against AT&T, the Department of Justice pledged to re-

port to the district court every three years as to whether there was a continuing need for the "line of business" restrictions that the settlement decree, the "Modified Final Judgment", imposed on the Bell operating companies (or BOCs). In 1987 the Department proposed that many of the restrictions be removed, including those on entry into the information services market. The district court rejected the information services. proposal and several others. On review, this court largely affirmed, but reversed and remanded as to information services, finding that the district court had employed the wrong standard in reviewing the Department's proposal. See *United States v. Western Electric Co.*, 900 F.2d 283, 289-93, 305-09 (D.C. Cir. 1990) ("*Triennial Review Opinion*").

On remand, the district court modified the decree, in an opinion that is something of a pushmi-pullyu. See *United States v. Western Electric Co.*, 767 F. Supp. 308 (D.D.C. 1991) ("*Remand Decision*"). While on the one hand asserting that "none of [the Department of Justice's immediate contentions] is supported by credible evidence," *id.* at 330, the court also concluded that under the standard established by this court in the *Triennial Review Opinion* it was bound to defer to those conclusions, *id.* The district court thus removed the ban on entry into information services. It stayed its own order of modification, but this court set the stay aside. *United States v. Western Electric Co.*, 1991-2 Trade Cas. (CCH) ¶ 69,610, 1991 WL 238308 (D.C. Cir. 1991).

A variety of media and information services interests challenge the modification. Although the district court in certain places mischaracterized the standard under which it was to review the Department's proposal, the evidence was such that, under the standard laid down in the *Triennial Review Opinion*, rejection of the Department's proposal would have been error. We affirm.

The standard for review of modifications on mutual consent

Under the Antitrust Procedures and Penalties Act, 15 U.S.C. §§ 16(b)-(h), know as the Tunney Act, the district court reviewing a consent decree must determine whether the entry of such judgment is "in the public interest." *Id.* at § 16(e). Although application of the Tunney Act to decree modifications has been contested, see Note, Modifications of Antitrust Consent Decrees: Over a Double Barrel, 84 Mich. L. Rev. 134 (1985), all participants have assumed the point, as did we in the *Triennial Review Opinion,* 900 F.2d at 295. There we held that the "public interest test", as applied to a modification assented to by all parties to a decree,[1] "directs the district court to approve an uncontested modification so long as the resulting array of rights and obligations is within the *zone of settlements* consonant with the public interest *today*." 900 F.2d at 307 (emphasis in original). That formulation made clear that it was not up to the court to reject an agreed-on change simply because the proposal diverged from *its* view of the public interest. Rather, the court was bound to accept any modification that the Department (with the consent of the other parties, we repeat) reasonably regarded as advancing the public interest. In our final sentence on the standard, we underscored the deferential character of the inquiry:

> The court should bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities "is one that will *best* serve society," but only to confirm that the resulting "settlement is 'within the *reaches* of the public interest.' "

Id. at 309 (emphasis in original) (citing and quoting *United States v. Bechtel Corp.,* 648 F.2d 660, 666 (9th

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[1] For this court's identification of "parties" for purposes of the above, see *United States v. Western Electric Co.,* 969 F.2d 1231 (D.C. Cir. 1992).

Cir. 1981), in turn quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)).

The appellants address the standard of review issue by selectively citing other language in the *Triennial Review Opinion*, assigning an absurd meaning to that language, and contending that therefore the language could not really be read to describe the standard for judicial evaluation of an uncontested modification. Finally—the point of their exercise—appellants leap to the conclusion that once we have banished the whipping boy of their creation, nothing will remain except a standard of de novo judicial evaluation. See Appellants' Brief at 54-68.

The language out of which appellants spin this argument is our statement that "Because the 'public interest' test must take its meaning from the nation's antitrust laws . . . , the appropriate question . . . is whether the proposed modification would be *certain* to lessen competition in the relevant market." *Triennial Review Opinion*, 900 F.2d at 308 (emphasis added). By reading "certain" to imply absolute certainty, appellants give the language a meaning that would extinguish Tunney Act review. Indeed, the district court voiced the same idea, saying that "the certainty standard may well be an impossible one". *Remand Decision*, 767 F. Supp. at 331. See also *id.* at 330-31 & n.116 (saying that our decision required opponents of noncontested modification to establish anticompetitive effects even more persuasively than under the "beyond-a-reasonable-doubt standard applicable to criminal cases").

This notion of utter certainty, and its correlative of abject deference to the Department, is a straw man. The focus of the disputed sentence was the nature of the factors that fit within the "public interest", which the court explained were antitrust considerations—the probable effects on competition within the relevant market. The sentences of the *Triennial Review Opinion* that address the role of the district court in relation to Department of Justice submissions (the passages quoted above

on the "*zone*" of settlements that fall within the "*reach*" of the public interest) make clear that the district court may reject an uncontested modification only if it has exceptional confidence that adverse antitrust consequences will result—perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency. *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 103, 103 S. Ct. 2246, 2255, 76 L. Ed. 2d 437 (1983) (when examining predictions within an agency's expertise, "a reviewing court must generally be at its most deferential"); *Telocator Network of America v. FCC*, 691 F.2d 525, 550 n.191 (D.C. Cir. 1982); *NARUC v. FCC*, 525 F.2d 630, 638-39 (D.C. Cir. 1976). We recognize that we are not, strictly speaking, reviewing agency action. However, as the Antitrust Division's assessment of likely competitive effect involves the same kind of predictive judgment, and the court's role is similarly secondary, that relation at least provides a helpful analogy.

The above view accords with other courts' understanding of the court-agency relation under the Tunney Act. As the Ninth Circuit found in *Bechtel*, "The balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General." 648 F.2d at 666. And in *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508 (W.D. Mo. 1977), while the court spoke of making an "independent public interest determination", it also found that it was not "to make *de novo* determination of facts and issues", and that its task was to determine whether the Department of Justice's explanations were "reasonable under the circumstances." *Id.* at 71,979-80. See also *United States v. Yoder Bros. Inc.*, 1989-2 Trade Cas. (CCH) ¶ 68,723 at 61,795 (N.D. Ohio 1986).

Insofar as appellants claim that the deferential standard adopted in the *Triennial Review Opinion* (and in *Bechtel* and the other cases noted above) is at odds with

the Tunney Act and other judicial interpretations, see Appellants' Brief at 28-54, the claim is one that they must pursue either by a suggestion for rehearing *en banc* or by petition for certiorari. We briefly note one special aspect of their argument, however. They suggest that it is inappropriate to defer to the Department when it is acting in a litigation mode, citing *Crandon v. United States*, 494 U.S. 152, 177-78, 110 S. Ct. 997, 1011, 108 L. Ed. 2d 132 (1990) (Scalia, J., concurring). Here the appellants are looking into the wrong end of the telescope. Parties to a contract have voluntarily decided to modify it; the interesting question is not why courts should allow modification, but why they should consider upsetting it. The answer appears to lie in the judicial involvement in the process. Cf. *Sam Fox Publishing Co. v. U.S.*, 366 U.S. 683, 689, 81 S. Ct. 1309, 1312, 6 L. Ed. 2d 604 (1961) (review to assure absence of bad faith or malfeasance in entry of consent decree); Note, Modifications of Antitrust Consent Decrees: Over a Double Barrel, 84 Mich. L. Rev. 134, 146 (1985) (arguing that judicial role in modification is grounded in consent decree's having itself been a judicial act). We need not explore these issues further, except to say that, even apart from the circuit law established in the *Triennial Review Opinion*, appellants are wide of the mark in supposing that courts should approach the parties' agreement to a modification with the same wariness as they would an adversary party's litigating position.

Insofar as appellants argue that our *Triennial Review Opinion* did not impose a standard of "strict certainty", see Appellants' Brief at 61, of course we agree—at least if that is understood to involve more deference than is conventional between court and agency on expert, predictive judgments. Despite the phrases quoted above from the *Remand Decision*, it is unclear what deference the district court actually extended. If it had demanded absolute certainty, i.e., indulged in total, rubber-stamp def-

erence, we would have to remand for reconsideration under the correct standard—*unless* the record before the court was such that any district court rejection of the proposed modification would have been reversible error. See *Pullman Standard v. Swint*, 456 U.S. 273, 292, 102 S. Ct. 1781, 1792, 72 L. Ed. 2d 66 (1982). In fact the record satisfies that standard. Accordingly we need not enter the elusive inquiry as to what standard the district court "really" applied. Nor need we consider the scope of our review of the district court findings. Although Fed. R. Civ. P. 52 prescribes the "clearly erroneous" standard for actions tried to the court without a jury, the better analogy may be to appellate review of district court application of the "substantial evidence" standard. In that context the district court decision drops out and the appellate court reviews the agency decision directly, its sole deference being to the agency. *Novicki v. Cook*, 946 F.2d 938, 941 (D.C. Cir. 1991); *Costello v. Agency for Int'l Development*, 843 F.2d 540, 543 n.5 (D.C. Cir. 1988). We need not address the issue of deference to the findings of the district court, however, for to the extent that they contradict the Department's conclusions they are indeed clearly erroneous.

Record evidence on the effects of removing the ban on entry into information services

In advocating removal of the information services ban, the Department made the following contentions: (1) that there was no substantial risk that removal of the ban would lessen competition either through the BOCs' use of their "bottleneck" power over local loop connections (i.e., intra-exchange services) to discriminate against competing information service providers, or through cross-subsidization of their own information services; (2) that under current conditions regulation would play a substantial role in minimizing any anti-competitive risks; and (3) that removal of the ban would benefit consumers by en-

hancing competition in information services. See Memorandum of the United States in Support of Motions for Removal of the Information Services Restriction, Joint Appendix ("J.A.") 797; see also *Remand Decision,* 767 F. Supp. at 330.

Participants on all sides of the dispute submitted affidavits on these issues, many by very distinguished economists. The issue before the court was limited: to determine whether the Department's views were well enough substantiated that it (the Department) could reasonably conclude that removal of the ban was in the public interest. The issue before us, under our self-imposed burden of deference to the district court, is whether that court was clearly erroneous to the extent that it found the Department's conclusion unreasonable.

(1) *BOC power to discriminate against competing information service providers and to cross-subsidize.* It is undisputed that the BOCs have monopolies over local telephone exchange service in their respective service areas. *Remand Decision,* 767 F. Supp. at 314-15. The district court was convinced that the BOCs could use that monopoly power to raise the transmission costs of any rival information service provider, thereby raising the costs and reducing the output of information services. *Id.* at 315. Raising the costs could take the form either of raising prices explicitly or degrading service (as by delayed installation of equipment, low priority restoration of service after an outage, or poor maintenance). See Fisher Aff., par. 15, J.A. 2031-32.

In assessing the ability of BOCs to raise rivals' costs, we assume arguendo that devices for avoiding the local loop altogether, such as satellite dishes, are inadequate. See *Remand Decision,* 767 F. Supp. at 315. But the record provides strong support—which the district court did not address at all—for the view that, quite part from such end-runs, BOCs will be unable to discriminate against competing providers. Such discrimination could

theoretically occur at either end of the information service transaction—the provider's or the customers'. Take the provider's end first. Professor Fisher notes that providers may prevent such discrimination by exploiting competition between BOCs, and between BOCs and non-BOC telephone companies, by moving or threatening to move their distribution facilities (the point where their information is fed into the telephone system) to a different region or to an independent company within the BOC's region. Fisher Aff., pars. 14-16, J.A. at 2031-33. Further, as Professors Stigler and Carlton say, large information service providers not only can but already do bypass the BOCs by constructing private networks. Two of the appellants' primary experts acknowledge the ability of high-volume providers to use by-pass to defeat any discrimination attempts. See Hall Aff., at 16, J.A. 2167; Noll Aff., at par. 8, J.A. 2584. While some providers may well be too small to defeat discrimination this way, it is hard to see what advantage a BOC could draw from beating down small rivals whose customers could readily shift to the BOC's larger competitors. Carlton Stigler Aff., pars. 34-35, J.A. at 1857-58.

This takes us to the customer end. See Noll Aff., par. 8, J.A. at 2584. Despite the local monopoly, the record indicates that even here there is much to undercut the threat of discrimination. First, it is evidently difficult, if not impossible, for BOCs to distinguish between information service provider messages and others, as both may come over regular voice lines. Carlton Stigler Aff., par. 28, J.A. at 1854; Hausman Aff., par. 34, J.A. at 2235. Moreover, as Professor Fisher notes, a BOC would not only have to distinguish between voice and data messages, but also between those data messages coming from a competitor and those from a noncompetitor (e.g., interoffice transmissions by corporations). Fisher Aff., par. 17, J.A. at 2033. The necessary scale of BOC detections would be enormous; Fisher observes that on one information system alone (DunsNet) customers gain access 60,000 times a day. *Id.* at par. 18, J.A. 2033-34.

The discrimination hypothesis appears to assume, moreover, that local interconnections are a major element of the total costs of providing information services. This seems untrue. One major information service provider well-known to lawyers, Commerce Clearing House, reports that only 15-20% of its costs are due to telecommunications, of which 30% are local exchange costs. Fisher Aff., par. 19, J.A. at 2034. Thus only about 4.5% to 6% of CCH's costs are susceptible to BOC discrimination. Even a 50% increase in local exchange costs would raise CCH's costs by only 3%. Another affiant cites evidence that local exchange costs amount to only 1% of providers' total costs. See Hausman Aff., par. 24, J.A. 2231.

The BOCs also offered evidence that non-BOC local exchange companies such as GTE have entered the information services market without using their bottleneck control anti-competitively. *Remand Decision,* 767 F. Supp. at 316. The district court dismissed the GTE experience on the ground that GTE had no ability or incentive to discriminate due to its "dispersed geographical base." *Id.* at 321; see also *United States v. GTE Corp.,* 603 F. Supp. 730, 734 (D.D.C. 1984). The distinction is far less compelling than it first appears, as its validity depends on the idea that local exchange dispersion would make it materially easier for an information service provider to escape from discrimination at the provider end. As we have already seen, however, the providers' means of escape from the BOCs are quite good—all that need be relocated is the origin of the provider's distribution system. Further, the difference in degree of dispersion is by no means overwhelming. First, the BOCs are not AT&T, but seven independent and potentially competing companies, each of which has independent telephone companies operating within its region. Fisher Aff., at par. 16, J.A. 2032-33. Second, GTE itself is not the totally scattered entity envisioned by the district court. As this court has previously noted, GTE controls local exchange service in the

entire state of Hawaii as well as in large portions of the Tampa and Los Angeles markets. *Illinois Bell v. FCC*, 883 F.2d 104, 112 n.6 (D.C. Cir. 1989); Fisher Aff. at par. 54, J.A. 2055-56. The evidence assembled by Professor Fisher shows that none of the anti-competitive consequences hypothesized by the district court have come to pass with GTE or other independent telephone companies, despite their entry into the information services market. Fisher Aff., pars. 53-63, J.A. at 2055-61.

Bafflingly, the district court characterized the BOCs' evidence on the bottleneck issue as "half-hearted", *Remand Decision*, 767 F. Supp. at 316, with barely a mention of the analyses we have just described. The affidavits in the record offer persuasive evidence that, despite their local monopoly power, the BOCs will be unable to discriminate against competing information service providers.

The district court also alluded to a cross-subsidy theory that was by no means central to appellants' objections—the possibility that BOCs might discourage others' entry by "acquiring a reputation for strategic predatory pricing" (by responding to entry by lowering prices), financing the predation by shifting costs to its price-regulated monopoly operations in the local loop. See *Remand Decision*, 767 F. Supp. at 315 (citing Hall Aff., pp. 4-5, J.A. 2155-56). The Hall Affidavit is brief and conclusory on the point. Strikingly, one of the appellants' affiants parried a BOC affidavit on predatory pricing by saying that predation was a "straw man" and that he was "inclined to agree" with the proposition that "the risk of classic predatory pricing alone" did not justify retention of the ban. Shapiro Aff., par. 62, J.A. at 2669. As we shall see, the pro-BOC affiants addressed the cost-shifting hazard in their treatment of regulatory constraints, to which we now turn.

(2) *Efficacy of regulation.* The BOCs and the Department of Justice pointed to regulatory safeguards that could limit anticompetitive effects even if the BOCs other-

wise had the incentive and ability to discriminate or cross-subsidize. The district court dismissed these contentions. It believed instead that regulators had never been successful in stopping the Bell system from engaging in anti-competitive activities, and that there were no changes tending to enhance their ability to do so. It disposed of references to current FCC rules that require the BOCs to charge themselves the same access rates as they charge others, for instance, with the observation that a comparable rule did not work *before* the Bell system break-up. *Remand Decision*, 767 F. Supp. at 317-18. Indeed, the court believed that the increasing complexity and diversity of the industry, including BOC entry into other fields, might make it harder than ever to detect or stamp out discrimination and cross-subsidization. See generally *id.* at 317-22.

There is a lot of evidence that the break-up and other recent developments have enhanced regulatory capability. The seven independent BOCs are *not* the old AT&T. As this court noted in the *Triennial Review Opinion*, the existence of seven BOCs increases the number of benchmarks that can be used by regulators to detect discriminatory pricing. See *id.*, 900 F.2d at 299. Indeed, federal and state regulators have in fact used such benchmarks in evaluating compliance with equal access requirements (i.e., the requirements disparaged by the district court) and in comparing installation and maintenance practices for customer premises equipment. See Arrow/Rosenfield Aff., par. 43, J.A. 1764; Grossman Aff., par. 28, J.A. 2146; Carlton/Stigler Aff., par. 44-45, J.A. 1863-64. Moreover, information service giants operating throughout the country, such as IBM, AT&T and GE, will notice any discrepancies in treatment by the various BOCs and will have the capacity and incentive to bring anticompetitive conduct to the attention of regulatory agencies. *Id.* at par. 47, J.A. 1864-65. The BOCs themselves will be each other's customers in the transmission of information services, with a unique capacity to spot misbehavior and

notify regulators. *Id.* at par. 48, J.A. 1865. Finally, any effort to establish a reputation for predatory responses to new entry will require that potential new entrants be aware of such predation; a BOC may have great difficulty establishing such a reputation among potential entrants while keeping it a secret from regulators. Carlton/Stigler Aff., par. 62, J.A. 1872.

Changes independent of the AT&T break-up also support the likelihood of more effective regulation. For example, Professor Kahn pointed to the FCC move in the direction of price cap regulation, which the FCC has in fact extended to the BOCs since his affidavit. See *National Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 179 (D.C. Cir. 1993). This reduces any BOC's ability to shift costs from unregulated to regulated activities, because the increase in costs for the regulated activity does not automatically cause an increase in the legal rate ceiling. Kahn Aff., par. 16, J.A. at 2393-94; Hausman Aff., pars. 32-33, J.A. 2260-61; *National Rural Telecom Ass'n*, slip op. at 8-9. In addition, the FCC has acted since the break-up to tighten its accounting rules, especially its treatment of joint costs, all tending to increase the chances of catching any attempts at cost-shifting. Farmer Aff., J.A. 1994-2017.

Similarly, Kahn argued that it was by no means valid to assume the prevalence of regulatory "capture". Noting state agencies' overwhelming concern for keeping the rates for local residential service low, he reasoned that this would inhibit any effort by the BOCs to shift costs into those (monopoly) services. He also noted that nearly every state allowed competitive resale of inter-LATA service—a rule clearly inconvenient to the BOCs and incompatible with an assumption of successful capture. Kahn Aff., pars. 10-11, J.A. 2391. Given Professor Kahn's careful analysis, not to mention his distinguished experience as a regulatory economist, it would take far more than a reference to the district judge's own experience

in the AT&T matter to vindicate his disparagement of Kahn's testimony as "completely in error". See *Remand Decision*, 767 F. Supp. at 318 n.49.

Of course, proponents of the entry ban submitted affidavits in its favor. The district court attached preeminent importance to that of Professor Noll, who argued that increasing product diversification would make strategic cost accounting and discriminatory practices hard to detect. Noll Aff., pars. 74-75, J.A. 2597-98; see *Remand Decision*, 767 F. Supp. at 320. The Noll affidavit is striking in that it focuses more on what BOCs might *want* to do than on their actual capacity for achieving it, and it does not truly address the post-break-up environment or developments such as price caps and enhanced FCC accounting rules, see Noll Aff., par. 72, J.A. 2597 (discounting these as either antedating the break-up or not yet adopted).

It is not, however, for use to choose among the opposing positions of distinguished economists. The issue is whether the Department of Justice's position had substantial factual support and was grounded in reasonable analysis. On the proposition that regulation would be a substantial obstacle to anticompetitive behavior, the Department passed this test.

(3) *Competitive benefits of BOC entry.* Parties favoring removal of the ban pointed to substantial benefits that they believed likely to follow. For example, they pointed to several segments of the information services market that are highly concentrated (e.g., alarm services, financial transactions, and airline reservations), arguing that BOC entry would make the market more competitive. Arrow/Rosenfield Aff., par. 23, J.A. 1753. Further, there is reason to believe that BOCs entering the information services market will have some economies of scope (the capacity to produce related goods or services at an aggregate cost lower than the total for each produced separately), with resulting consumer benefits. See Carlton/Stigler Aff., pars. 17-22, J.A. at 1846-50.

The district court brushed these contentions aside as "preposterous", *Remand Decision,* 767 F. Supp. at 326, partly on the theory that BOC competition could contribute no consumer benefit because the BOCs had no prior experience in the content or substance of information services. *Id.* This is a curious idea, as businesses are capable of acquiring expertise and experienced talent. Under the court's view, new entry could rarely create competitive benefits; even a development so close to home as recent entries into long-distance telephone service could not be expected to generate consumer benefits.

Instead of consumer benefit, the court envisioned a nightmare in which the BOCs would drive out the current competitors and perhaps "extinguish[]" competition altogether. *Remand Decision,* 767 F. Supp. at 326. The latter scenario is of course internally contradictory; because there are seven BOCs, competition would exist even if they drove out all the incumbents. More generally, the district court's scenario necessarily depends upon successful use of some combination of discrimination and cross-subsidization; we have already reviewed the obstacles that such efforts would confront.

It is worth noting here the character of some of the firms that the BOCs would have to drive out. They include GE (with annual revenues about five times those of a BOC), AT&T itself (revenues three times those of a BOC), IBM and Sears with their Prodigy service, Merrill-Lynch, ITT, Mead Corporation, American Express, Citicorp, Chase Manhattan Bank, and a variety of foreign and independent telephone companies. Hausman Aff., pars. 11-14, J.A. 2225-26. These firms are not pushovers. Also, we have already noted evidence that local exchange costs represent only a tiny share of information service providers' total costs, so that the BOCs' bottlenecks do not, in perspective, seem like invincible weapons.

If appellants are right, BOC entry will raise prices and reduce output in the information services industry;

if the Department is right, BOC entry will lower prices and expand output. Firms that sell goods and services that are *inputs* to the production and use of information services stand to gain an expanding market if the Department's prediction is right, and have the incentive to make a completely unbiased judgment on the matter. It is something of a vindication of the Department's view that representatives of those firms, the Computer and Communications Industry Association and the United States Telephone Association (which includes about 1000 independent local telephone companies), filed briefs with the district court supporting removal of the ban. See CCIA Brief 17-18, J.A. 78081; USTA Brief 1, 5-7, J.A. 784-87.

We stress again that the judicial role here is *not* to determine whether removal of the information services ban is an optimizing move. Under the arrangements made by Congress, that task (in the present context) is for the Department of Justice, subject to judicial review. The distinguished experts marshalled by the appellants may, in the eyes of an omniscient being, be "right". Conversely, the fact that removal of the ban is supported by an array of prominent economists (including two Nobel laureates, Stigler and Arrow) does not in itself make that action right. The quality of their presentations is enough, however, to establish an ample factual foundation for the judgment call made by the Department of Justice and to make its conclusion reasonable. Insofar as the district court may be considered to have found the contrary, the finding was clearly erroneous.

We affirm the judgment removing the information services line of business restriction from the Modified Final Judgment.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. No. 82-0192 (HHG)

UNITED STATES OF AMERICA,
Plaintiff,

v.

WESTERN ELECTRIC COMPANY, INC., *et al.*,
Defendants.

July 25, 1991

OPINION

HAROLD H. GREENE, District Judge.

The issue before the Court in this, the most recent chapter of this antitrust case, is whether the Court should remove the restriction on information services imposed as part of the consent decree. Under a decision of the Court of Appeals, such removal is required if this Court is not able to conclude from the evidence that the entry of the Regional Companies into the presently restricted market would be certain to lessen competition.

I

History

This lawsuit was brought by the Department of Justice on behalf of the United States against the American Telephone and Telegraph Company in November 1974. Fol-

lowing a period of discovery and of pretrial motions, an eleven-month trial began in January 1981. *See generally, United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131 (D.D.C.1982), *affirmed sub nom. Maryland v. United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed. 2d 472 (1983). Shortly before the taking of evidence was to be concluded, the parties agreed upon and submitted to the Court a proposed consent decree.

The Court held extensive Tunney Act [1] proceedings, in which all organizations, private and public (including twenty-nine States), with an interest in the decree were permitted to intervene and to participate. The Court approved the decree with some modifications on August 24, 1982, and entered it on that date as a final judgment. The Supreme Court affirmed that judgment on February 28, 1983.[2]

The seven Regional Companies,[3] which had inherited all the local telephone companies of the Bell System at the time the System's assets were split up, were subjected under the terms of the decree to several restrictions. These restrictions were based upon the kinds of anticompetitive activities that the local companies had engaged in while they were still a part of the Bell System, or were likely

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[1] Antitrust Procedures and Penalties Act, 88 Stat. 1706, 15 U.S.C. § 16(b)-(h).

[2] The Supreme Court again summarily affirmed this Court's subsequent approval of the AT & T Plan of Reorganization which was drafted under the auspices of the decree. *United States v. Western Electric Co.*, 569 F.Supp. 1057 (D.D.C. 1983), *aff'd, California v. United States*, 464 U.S. 1013, 104 S.Ct. 542, 78 L.Ed.2d 719 (1983).

[3] From the very outset, this Court has eschewed alphabetical abbreviations which might be incomprehensible to those not directly involved in this litigation, and accordingly it has used the term Regional Companies rather than RBOCs, it has made reference to the decree rather than the MFJ, and the like. The Court will continue to avoid bureaucratic and technical terminology to the extent that it is possible to do so.

to engage in because the ability and the incentive therefor were present. As here relevant, one of the provisions of the decree prohibits the Regional Companies from providing interexchange and "information services," [4] such services being defined as follows:

> "Information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

552 F.Supp. at 229.

In 1987, in response to an initiative of the Department of Justice, the Court conducted a so-called triennial review of the continuing need for the restrictions imposed by the decree. At that time, again, the Court permitted wide participation in and intervention by interested parties, both private and governmental.

Following that review, the Court removed the restriction on the transmission of information, as well as a comprehensive catch-all restriction on the entry of the Regional Companies into non-telecommunications markets. However, the Court concluded that there was no basis for removing the three "core" restrictions—those on interexchange services, the generation of information, and the manufacture of equipment. *See generally, United States v. Western Electric Co.*, 673 F.Supp. 525 (D.D.C. 1987).

The basic rationale for keeping intact the core restrictions was that the Regional Companies retained their

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[4] "After completion of the reorganization . . . no BOC shall . . . provide interexchange or information services. . . ." Section II(D)(1) of the decree.

monopoly control of the local telephone switches and wires, with the consequence that competitors of these companies in the markets affected by the restrictions could reach their ultimate customers only at the Regional Companies' sufferance. These companies, reasoned the Court, were in the same position as their predecessor Bell System, which "could with ease discriminate against [competitors] by such practices as delaying interconnections, providing inferior connections, charging exorbitant prices, or refusing to attach competitors' products altogether. [The Regional Companies are] also able to subsidize [their] competitive products with funds syphoned off from the monies paid in by the ratepayers. . . ." 673 F.Supp. at 600, 602.

The Regional Companies and several other parties, including the Department of Justice, took appeals. The Court of Appeals affirmed the decisions of this Court on several issues, but it reversed and remanded the issue of information services. *United States v. Western Electric Co.*, 900 F.2d 283 (D.C.Cir.), *cert. denied sub nom. MCI Communications Corp. v. United States*, —— U.S. ——, 111 S.Ct. 283, 112 L.Ed.2d 238 (1990). The appellate tribunal held that, inasmuch as none of the original parties to the consent decree [5] is opposing the removal of the information services restriction, the appropriate provision of the decree to govern judicial decisions with respect thereto is section VII of that decree [6] (which,

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[5] The Department of Justice and AT & T were those original parties, but the Regional Companies which used to be integral parts of AT & T (or the Bell System as it is often referred to) were held to be in the same category.

[6] Section VII of the decree states:

> Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Modification of Final Judgment, or, after the reorganization specified in section I, a BOC to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Modification of Final Judgment,

the appellate court said, establishes a public interest standard), rather than section VIII(C)[7] (which deals only with removals of restrictions contested by one of the original parties).[8] 900 F.2d at 295, 305-07.

The Court of Appeals went on to indicate that, in view of the expertise of the Department of Justice in enforcing the antitrust laws, this Court was to defer to that Department with respect to a number of issues.[9] Inasmuch as this Court had in several respects applied legal standards differing from those laid down in the Court of Appeals opinion, the case was remanded for further fact-finding with respect to the information services restriction under the criteria established by the appellate court.

Following the issuance of the appellate mandate, this Court once again entertained briefs from all the parties, including the intervenors which would be affected by the

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for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

552 F.Supp. at 231. This vesting of future jurisdiction in this Court was in the consent decree as drafted by the parties; the Court did not add it to the decree or alter it in any way.

[7] Section VIII(C) provides:

> The restrictions imposed upon the separated BOCs by virtue of section II(D) shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

552 F.Supp. at 231. This section was drafted by the Court and its adoption as part of the decree was made a condition of the Court's approval. *See* 552 F.Supp. at 225.

[8] The Court of Appeals also held that the Department of Justice may not petition for removal of a restriction under Section VIII(C). 900 F.2d at 294.

[9] These issues, and the precise language employed by the Court of Appeals with respect to this subject, are discussed in Part VII-A, *infra*.

decision, and it heard oral argument during two successive days. In addition to their legal arguments, various parties and intervenors also submitted voluminous evidence in the form of affidavits and exhibits.[10] These affidavits, exhibits, and arguments form the basis for the instant decision.

The Court will consider first the various aspects of the substantive issues [11] discussed by the parties to the proceeding.

II

Market Power

The Court of Appeals has stated that the exercise of market power is a necessary prerequisite to damage to competition under the antitrust laws, and that "unless the entering BOC will have the ability to raise prices or restrict output in the market it seeks to enter, there can be no substantial possibility that it could use its monopoly power to 'impede competition.' " 900 F.2d at 296. The issue is whether the Regional Companies possess market power within the meaning of that definition.

A. Market Power in General

The Regional Companies note that market power is deemed to exist when there are substantial barriers to

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[10] MCI and the American Newspaper Publishers Association were the only affected parties suggesting that it would be useful to hold an evidentiary hearing, in addition to the written submissions of evidence. MCI's Response to United States Motion for a Briefing Schedule at 2; Reply of the American Newspaper Publishers Association at 3. The Department of Justice affirmatively stated that evidentiary hearings were in its view unnecessary and inappropriate. Reply of the United States at 2. The Court has concluded that it is able to make the findings required by the Court of Appeals on the basis of the affidavits and exhibits that have been filed.

[11] The issues surrounding the Court of Appeals requirements regarding what may generically be called "burden of proof" questions are discussed in Part VII, *infra*.

entry, a large market share, and a paucity of substitutes, and they contend most notably that they presently lack any market share in the information services market and therefore could not possibly have market power. Moreover, according to the affidavits and exhibits submitted by these companies, they could not hereafter obtain significant market share in competition with the many large companies already in the market,[12] and they would be unable in practice to raise their competitors' costs (through either higher tariffs or degraded access to the local exchange). Even if they could achieve such ends, the Regional Companies argue, they might at most be able to raise prices in the local exchange market, but not in the information services market—the critical area for antitrust analysis according to the Court of Appeals.

The most detailed evidence adduced by the Regional Companies on market power is an affidavit of Franklin Fisher, a professor of economics at the Massachusetts Institute of Technology.[13] According to Professor Fisher, the Regional Companies would be able to achieve market power only if (1) they had the ability to raise the costs of their rivals; (2) this ability gave them power over the price of information services; (3) regulators were unable to defeat this anticompetitive behavior; and (4) efficiency losses due to anticompetitive conduct by the Regional Companies outweighed the benefits to the public of the Regional Companies' presence in the market.[14] In this Part of this Opinion, the Court will ex-

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[12] *See, e.g.*, Hausman Affidavit at para. 12 (Exhibit to Regional Companies Motion).

[13] Professor Fisher has a Ph.D. in economics from Harvard University; he has written extensively on the economics of antitrust law and regulation; and among his other achievements are the presidency of the Econometric Society and the receipt of a John Simon Guggenheim fellowship.

[14] Fisher Affidavit at para. 6 (Exhibit 3 to Regional Companies Reply).

amine only the first and second factors described by Professor Fisher, the third and fourth factors are discussed in Parts III and VI, respectively.

Professor Fisher asserts in amplification of his conclusions that the information services market is national in scope, and that this fact permits independent information services providers to move their operations to the territory of a Regional Company that does not discriminate against them.[15] Moreover, according to the Fisher affidavit, the Regional Companies will not be able to discriminate at the consumer end of the telephone circuits because of the difficulty of acting selectively there, and the only way they could have power over price would be through collusion among all of them, which would be difficult to achieve inasmuch as seven different companies are involved.[16] Professor Jerry A. Hausman similarly contends that discrimination by a Regional Company would be inconsistent with market data and economic theory, in substantial part because the Regional Companies will compete against each other.[17]

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[15] *Id.* at para. 13, 14.

[16] *Id.* at para. 16, 26. Professor Fisher does not consider, however, that the existence of the joint research and development conducted by Bellcore on behalf of all the Regional Companies, in areas ranging from network architecture design to financial management, would greatly facilitate collusion. *See, e.g.*, Affidavit of Stanford University Professor Roger Noll at para. 53.

[17] Hausman Affidavit at para. 16 (Exhibit 2 to Regional Companies Reply). Professor Hausman dismisses concerns about denials and delays in service, poor quality service, and delays in necessary repairs as "a familiar litany." *Id.* at para 22. If Hausman is suggesting that, because these concerns are familiar they have no basis in reality, his reaction is like that of the French police inspector in the motion picture *Casablanca* who was "shocked—*shocked*" when he was told that gambling was going on in Humphrey Bogart's cafe. The litany may be familiar, but the facts behind it are nonetheless real. These facts were proved during the *AT & T* trial by many witnesses in testimony consuming many weeks. With respect to their control over the local exchange, the Regional Companies are of course now largely positioned as was AT & T before 1984.

Other evidence submitted by the Regional Companies denies the existence of incentives to engage in anticompetitive acts. Thus, Dennis Carlton and George Stigler, both professors of economics at the University of Chicago, contend that the Regional Companies do not have an incentive to discriminate against competing information services providers because, if a competitor were driven out of business, the Regional Company would lose local exchange revenues from that competitor.[18]

As concerns the Department of Justice, it submitted *no* additional affidavits or other evidence on this or any other issue in the remand proceedings,[19] with the exception of an appendix summarizing current regulations of the Federal Communications Commission. It may be regarded as odd that, on a remand for the specific purpose of the compilation of an evidentiary record, the Department produced no evidence whatever.[20]

In the briefs it has filed in the current proceeding, the Department largely contents itself with supporting the arguments made by the Regional Companies.[21] But it is

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[18] Carlton and Stigler Affidavit at para. 40 (Exhibit 4 to Regional Companies Reply). Any economic disadvantage due to the loss of exchange revenues from independent information providers would of course be more than made up through Regional Company assumption of all the business of, and the profits previously earned by, these providers.

[19] This is so even though the Court had invited all the parties to structure their submissions in the manner of summary judgment motions.

[20] The Department did make frequent reference to the report of its consultant Peter Huber which had been before this Court in the earlier triennial review decision.

[21] However, the Department does not agree with these companies with regard to the issue of the relevant market. While Professeor Hausman on behalf of the Regional Companies posits a broad information market which includes computer manufacturers, financial service companies, airlines, retailers, and the like (Hausman Affidavit at 4; Regional Companies Brief at 28-31), the Depart-

of more than academic or historical interest that, at the time of the adoption of the information services restriction, the Department postulated and persuaded the Court that the restriction was absolutely necessary, explaining as follows:

> The firms that provide information services must rely on access to local exchange facilities under the ownership and control of the [Regional Companies]. As commenters such as the American Newspaper Publishers Association and the Association of Telephone Answering Exchanges point out, *if the [Regional Companies] were permitted to offer information services they would have the power and the incentive to deter the development of competitive markets for these services.* The Department, therefore, continues to believe that the [Regional Companies] must be precluded from engaging in such activities to ensure the development of competitive markets for information services.[22]

The Department now states that it had concluded by 1987 that no substantial possibility existed that the Regional Companies could use their monopoly power in local exchange markets to impede competition in information services markets. However, that conclusion rests essentially only on the proposition that, in view of the decree's nondiscrimination provisions and of the present regulatory regime, it would be virtually impossible for a Regional Company to discriminate on a widespread basis without detection and sanction.[23] The issue of regulation

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ment states that "information services do not comprise a single market; they vary with respect to concentration, ease of entry, and dependence on local telephone facilities" (Brief for Appellant United States at 9-10 (Docket 87-5388) (filed April 17, 1989)).

[22] Response of the United States to Public Comments on Proposed Modification of Final Judgment at 65 (filed May 20, 1982) (emphasis added).

[23] Motion at 17. The Department also acknowledges that independent providers may lose profits or market share as a consequence

is discussed in Part III, *infra*. Suffice it to say at this point that regulation was also present, albeit in a somewhat different form, when the Department unambiguously and vigorously called for a prohibition on Regional Company participation in the information services market.

Regarding that aspect of its explanation which relies on the non-discrimination provisions of the decree, the Department notes that the degradation of calls to and from competing information service providers would be improper [24] under those provisions (as well as being difficult). The Department does not explain on what basis it may be assumed that, following the removal of the specific restriction on information services, the Court could reasonably convert the general antidiscrimination provisions of the decree into effective authority for restraining Regional Company anticompetitive action against independents with respect to information services, particularly since, on its face, those provisions prohibit only discrimination in favor of AT & T.[25]

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of the Regional Companies' entry into the market, but it assumes that this would occur as a result of Regional Company "efficiency or innovation," Reply Brief at 27. Of course no one can know at this time whether the Regional Companies will be efficient and innovative in information services. The Department does not acknowledge that there exists at least the possibility that the companies will gain profits or market share as a result of other factors, *i.e.*, anticompetitive activities.

[24] Motion at 17, 19-21.

[25] Section II(B) of the decree, reprinted at 552 F.Supp. at 227, states:

> B. No BOC shall discriminate between AT & T and its affiliates and their products and services and other persons and their products and services in the:
>
> 1. procurement of products and services;
>
> 2. establishment and dissemination of technical information and procurement and interconnection standards;

B. Market Power as a Consequence of Bottleneck Control

Market power is often the consequence of sheer size or financial strength; but as the intervenors [26] point out, in the instance of the Regional Companies, their market power stems not from either of these factors [27] but from their still almost complete domination over the "last mile" of the telephone network, *i.e.*, their monopoly of the local wires and switches without which few, if any, competitors can reach the ultimate consumers of telephone-based information services. In fact, around ninety-nine percent of the traffic to the ultimate subscriber must still pass, in the end, through the Regional Companies' local loops.[28]

This basic circumstance [29] gives these companies the ability to exercise market power [30] with respect to the in-

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3. interconnection and use of the BOC's telecommunications service and facilities or in the charges for each element of service; and

4. provision of new services and the planning for and implementation of the construction or modification of facilities, used to provide exchange access and information access.

[26] In order to avoid unnecessary complication, the Court will refer to the opponents of the point of view advocated by the Regional Companies as the intervenors, although several of the intervenors favor that point of view.

[27] However, these factors may likewise be present here.

[28] Transcript of April 19, 1991 hearing at 41; *see also,* Affidavit of Robert Hall at 16 (Exhibit 1 to MCI Opposition); and 673 F.Supp. at 536-40.

[29] It has long been established that essential facilities, that is, facilities which cannot feasibly be duplicated but which are critical to competitors, are a type of entry barrier. Whoever controls such an essential facility has the power to exclude competition, and such control indicates market or monopoly power. *See Otter Tail Power Co. v. United States,* 410 U.S. 366, 377, 93 S.Ct. 1022, 1029, 35 L.Ed.2d 359 (1973); *United States v. Terminal R. Ass'n,* 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912); *Hecht v. Pro-Football, Inc.,* 570 F.2d 982, 992-93 (D.C.Cir.1977).

[30] For the reasons discussed in the body of this Part of the Opinion, the Court finds as a fact that the *ability* to exercise market

formation services markets, that is, to raise price, to restrict output, or both. The Regional Companies would be able to raise prices by increasing their competitors' costs, and they could raise such costs by virtue of the dependence of their rivals' information services on local network access. As Professor Hall states, "[w]hen all but one firm in a market have higher costs, the inevitable result is a higher price, lower output, and lower consumer welfare." [31] Similarly, a Regional Company would be capable of discouraging entry by acquiring a reputation for strategic predatory pricing and denying its competitors post-entry profits,[32] and it would be able to do so credibly because it could shift the costs of its information services to its regulated operations.[33]

The Court is further of the view that, if relieved of the restriction, the Regional Companies would carry out these strategies because (1) this was the pattern of their operations when they were a part of the Bell System, and (2) even after the break-up of that System, they have been engaging in these practices to the extent that they have been permitted into markets that offered opportunities therefor. *See* Part IV, *infra*.

The evidence [34] also demonstrates that non-telephone-based services are not substitutes for the information

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power is fully present. The *incentive* to exercise such power may be deduced from the expectation of increased profits and the acquisition by Regional Company managers of the ability to direct increasingly diversified, increasingly powerful conglomerates. In fact, since they were established, the companies have made many efforts to enter markets in which their bottleneck monopolies give them an advantage over possible competitors. *See* Part IV, *infra*.

[31] Hall Affidavit at 28 (Exhibit 1 to MCI Opposition).

[32] *See, e.g.*, R. Posner, *Antitrust Law* 186 (1976).

[33] Hall Affidavit at 4-5.

[34] Affidavit of Walter Sinback at pp. 5-12 (Exhibit to Opposition of General Electric Communications & Services).

transmitted over the telephone network, if only because the basic telecommunications network has distinct properties not available through other means: only the telecommunications network can offer two-way interaction with up-to-the-minute information databases accessible by a large customer base, including occasional users.[35] Clearly, telephone-based information services constitute a market that is separate from services delivered by other means.[36]

What is notable in the papers submitted on this issue by the Regional Companies is what is not discussed or discussed only to a limited extent. In view of the centrality of the intervenors' argument that the Regional Companies have market power because of their control of the bottlenecks,[37] it might have been expected that the proponents of a removal of the information services restriction would first acknowledge the contention regarding that aspect of market power, and then attempt in some substantial way, by affidavits and otherwise, to answer it. Although half-hearted attempts are made to counter the intervenors' bottleneck point, recognition of the importance of the bottleneck issue is missing and so is a fully-developed, persuasive response.

The Regional Companies do assert that "[e]xperience since divestiture, both at home and abroad, has demonstrated that control over the local telephone exchange is

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[35] *See also*, Report of Peter Huber, submitted by the Department of Justice during the triennial review proceedings, at 6.23.

[36] Another factor not present in the standard market analysis proffered by the Regional Companies is that the companies are seeking to enter the competitive information services market while they also retain their regulated local telephone operations—operations that can easily be used as cash cows from which they can milk money and then lower their own information services prices to deny profits to their competitors. The issues surrounding that circumstance are discussed in Part V, *infra*.

[37] *See* note 29, *supra*.

not a means to acquire market power in information services." [38] But there has of course been no experience with information services, for the Regional Companies have been forbidden since their birth to engage in such services (except for the limited purpose of transmitting information generated by others). *See United States v. Western Electric Co.*, 714 F.Supp. 1, 5-7 (D.D.C. 1988).

The Court permitted the Regional Companies to establish elaborate facilities and processes for the transmission of information generated by others precisely because it concluded that the "potential for anti-competitive behavior by the Regional Companies with respect to transmission only is very much limited, if only because, in the absence of their participation in the generation or manipulation of content, these companies have little incentive for discrimination against competitors in the information market." 714 F.Supp. at 5.

The Regional Companies attempt to bolster their "experience" argument by asserting that if their bottleneck control were sufficient to produce market power, the result would have evidenced itself in the CPE (customer premises equipment) market and in the experience of the GTE Corporation.[39] However, as discussed at pp. 321-22, *infra*, neither the CPE experience nor that of GTE is relevant; they prove only that, where the ability or the incentive to discriminate is lacking, discrimination will not be practiced.

Beyond that, the Regional Companies assert that practical substitutes exist for their local lines and switches (a contention with which even the Justice Department disagrees, *see* note 45, infra). At the same time, the companies provide no response to the intervenors' contention that their bottlenecks enable them to discriminate

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[38] Motion at 21.

[39] Motion at 21; Reply Brief at 74.

with respect to features necessary for the transmission of information services (*see* Part IV, *infra*).

The Department of Justice concedes that "[i]f an information service is accessible to customers through the public telephone network, information service providers will depend to some extent on the BOC's local exchange facilities and services." [40] But the Department goes on to contend that this factor does not constitute an adequate basis for the maintenance of the restriction because this Court allegedly found that a discrimination strategy would be so risky that a Regional Company would not discriminate.[41] That reliance is surprising for, as the Department knows, the Court made the finding referred to in the context of Regional Company entry into miscellaneous *non-telecommunications* businesses.[42] These are of course markets with wholly different contours in which, as distinguished from the information services market, the Regional Company local monopoly could play only a minor role.

The Department of Justice and the Regional Companies next engage in a lengthy and passionate defense of vertical integration, suggesting that the restriction [43] herein is based on a pervasive hostility to vertical integration.[44]

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[40] Justice Department Motion at 15. The Department of Justice differs from the Regional Companies on that issue, too, for unlike the companies, it concedes that various information services markets differ with respect to ease of entry, and that the independent information services providers could not, in practice, operate their own substitutes for the Regional Company bottlenecks.

[41] Reply Brief at 33-35.

[42] 673 F.Supp. at 599.

[43] Although the arguments are couched in terms of the restriction on information services, their logical effect reaches the other decree restrictions as well.

[44] Justice Department Reply Brief at 15-16, 27-28; Kahn Affidavit at 17-20; Carlton and Stigler Affidavit at 10-14 (Exhibits 1 and 4 to the Regional Companies Reply Brief).

None of the Court's positions, either now or in the past, denigrated vertical integration, nor has the Department of Justice—the author of the restriction—demonstrated hostility to that concept.

During the trial of the antitrust action against it, AT & T argued, just as the Regional Companies do here and now, that the antitrust effort constituted an attack on vertical integration. It was AT & T's announced expectation that, as a challenge to vertical integration, the antitrust action would be dismissed. However, the Department of Justice explained in response that a fundamental difference exists between vertical integration may be both useful economically and protected by the law, on the one hand, and a combination in one enterprise of a rate-of-return monopoly and various competitive ventures, on the other. The Court fully endorsed that position. *United States v. American Tel. & Tel. Co.*, 524 F.Supp. 1336, 1373-74 (D.D.C.1981). The resuscitation of the argument ten years later by AT & T's heirs does not enhance its persuasiveness.

Finally, in answer to the intervenors' bottleneck argument, the Department recites such generalities as that independent information service providers might not even be connected to the local loops controlled by the Regional Companies—a point in effect refuted by the Department's own concessions elsewhere [45]—and that it is "aware of no evidence that the [Regional Companies] would act in concert in the provision of information services. . . ." [46] The Department fails to explain how there

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[45] The Department of Justice has conceded that the available alternatives to the Regional Company exchange facilities are not "close substitutes" for local exchange services for many providers, and that it therefore could not "conclude at this point that alternative transmission media would in themselves effectively constrain [Regional Company] discrimination against most information service providers." Motion at 32-33.

[46] Motion at 29.

could be such evidence at a time when the Regional Companies are prohibited from providing information services and have presumably complied with that prohibition.

On the basis of the considerations summarized above, the Court has no hesitancy in concluding that legal and economic theory which neglects, or accords little weight to, the bottleneck factor, is entirely unrealistic. The Court further holds, on the basis of the evidence before it that, by virtue of their indispensable and ubiquitous local wires and switches, the Regional Companies possess market power in the information services market.[47]

III

Efficacy of Regulations

A. General

Both the Regional Companies and the Department of Justice contend that regulation is a significant constraint on the ability of these companies to raise their information service rivals' costs and decrease output in the information services market. The basic undergirding for that argument is that the FCC's *Computer II* rules and *Computer III* Open Network Architecture (ONA) "require the BOCs to provide their information services competitors access to BOC exchange services at the same rates the BOCs' own information services pay."[48] That argument overlooks, however, that in the days prior to its break-up, the Bell System was under a comparable obligation by virtue of the then existing FCC regulations, but

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[47] Of course, unless and until they are allowed fully into the information services market, the companies as a general matter lack the incentive to exercise such power because they do not benefit from decreased profits for other information services providers nor can they achieve monopoly profits for their own information services. *See also,* note 30, *supra.*

[48] Department of Justice Reply at 36; *see also,* Regional Companies Reply at 53-56.

that these regulations were entirely incapable of halting anticompetitive activity.[49]

As the Court found when, as an alternative to the structural relief ultimately adopted, an injunction comparable to a regulatory regime was being considered:

> It would be difficult to formulate an order that would effectively deal with all of the different kinds of anticompetitive behavior that are claimed to have occurred over a considerable period of time, in various geographical areas, and with respect to many subjects. There is evidence which suggests that AT & T's pattern during the last thirty years has been to shift from one anticompetitive activity to another, as various alternatives were foreclosed through the action of regulators or the courts or as a result of technological development. . . .
>
> An even more formidable obstacle is presented by the question of enforcement. Two former chiefs of the FCC's Common Carrier Bureau, the agency charged with regulating AT & T, testified that the Commission is not and never has been capable of effective enforcement of the laws governing AT &T's behavior. In their view, this inability was due to structural, budgetary, and financial deficiencies within the FCC as well as to the difficulty in obtain-

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[49] *See* Noll Affidavit at para. 37 (Exhibit to American Newspaper Publishers Association Opposition). The Court rejects as completely in error the conclusion of Professeor Alfred Kahn, one of the Regional Companies' economists, who minimizes the possibility of "regulatory capture," arguing that this notion is a mere "caricature" of the regulatory reality. Affidavit at 3 (Exhibit 1 to Regional Companies Reply). He states that "during the 1960s and 70s, the public utility regulatory commissions showed themselves . . . excessively disposed . . . to protect competitors from unfair disadvantage . . . ." *Id.* at 12. Having heard evidence at the eleven-month trial in this case, the Court finds that, at least in the telecommunications field, there is no basis whatever for Professor Kahn's conclusion.

> ing information from AT & T. Whatever the true cause, it seems clear that the problems of supervision by a relatively poorly-financed, poorly-staffed government agency over a gigantic corporation with almost unlimited resources in funds and gifted personnel are no more likely to be overcome in the future than they were in the past.

552 F.Supp. at 167-68 (footnotes omitted).

B. New Regulations

The suggestion is made in response that the present regulations under present conditions, involving seven corporations rather than one, will be more successful than was the pre-1984 regulatory regime. Although the current regulations include a number of new features, on balance they are, if anything, less likely to be effective than those that were supposed to constrain the Bell System. For what cannot be overemphasized is that, as the structure of a corporation becomes more complex and as it deals in more and more different products and services, it becomes increasingly difficult for regulation and regulators to oversee its operations and restrain anticompetitive efforts.[50]

The Regional Companies engage in a great many more non-telephone activities than did AT & T at any time in its existence. At least since the entry of the first consent decree in 1956 and until the resolution of the lawsuit underlying this proceeding in 1984, the Bell System was restricted to the provision of telephone service (through its Long Lines department and the local operating companies), the manufacture of telephone equipment (through Western Electric), and research (through Bell Laboratories). The Regional Companies, by contrast, are already engaged in activities too numerous to list or

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[50] *See* Affidavit of Glen Robinson, former FCC Commissioner, at 10-11 (Exhibit to Opposition of American Newspaper Publishers Association).

describe—from cellular phone service in the Soviet Union [51] to cable television in other countries, the making of loans to other corporations, the sale of software to banks and hospitals, and the conduct of market research,[52] to name but a few. In fact, there appear to be no other utilities under regulation in the United States with anywhere near as many different facets and active business interests as the seven Regional Companies.

Because of the diversification of the companies—a characteristic that would be vastly amplified by a grant of their current request—regulation has become increasingly problematic, to the point where one state regulatory body has felt compelled to explore a new structural solution—the divestiture of NYNEX's local exchange operations from its competitive enterprises. *New York Times*, October 4, 1990 at A1, col. 5; *Wall Street Journal*, October 4, 1990 at A5, col. 1. In view of the broad plans and ambitions of the various Regional Companies, these complications would be bound to multiply and so would be the obstacles to effective regulation.

Open Network Architecture is supposed to unbundle the various features available over telephone lines, in theory providing independent information service providers with more complete information about network features and allowing them to pick and choose the specific features they need. The proposed *Computer III* rules also call for new regulations on cost accounting designed to render it more difficult for Regional Companies to subsidize their information services with revenue from their

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[51] 11 *Communications Daily* No. 137, p. 4 (July 17, 1987).

[52] Force, "U S West Scales Back Leasing; Finance Subsidiary Plots Course as Merchant Bank," *American Banker* 6 (November 15, 1988); Layne, "Nynex Builds Software Role With Agreement to Buy SSI," *American Banker* 3 (July 20, 1990); "Bell Atlantic To Acquire Simborg Systems," *Modern Healthcare* 19 (June 25, 1990); Powers, "Nynex Nabs Presence in U.S. High-tech Research," *Network World* 9 (April 18, 1988).

local exchange monopoly. *See* 3 FCC Record 1150 (1988); 2 FCC Record 1298 (1987).

However, one immediate problem with these rules is that they have little or no track record from which a court could reach a conclusion as to their efficacy. The Court of Appeals for the Ninth Circuit vacated the *Computer III* rules last year, *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990), an action that had the effect of also vacating the ONA regime. The FCC did reinstate ONA in December of 1990, 1990 FCC LEXIS 6662, and last month it established a tariff structure.[53] However, the Regional Companies are not required to file new tariffs for these services until November 1991.[54] In short, ONA is still developing and evolving, and its success in enabling competitors in the information services market to obtain the features they need is entirely unproven. Thus, with respect to regulation, the situation is not significantly different from what it was last year when the Court of Appeals concluded that any assessment of the new FCC regulatory regime was too speculative. 900 F.2d at 298.[55]

C. Inherent Problems

Beyond the naturally still isolated examples of anti-competitive conduct discussed below, there is the overriding fact, which experience has validated again and again, that as a practical matter it appears to be impossible for regulators to devise simple rules to govern the many economic, technical, and financial circumstances

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[53] 11 *Communications Daily* No. 115, p. 3 (June 14, 1991).

[54] *Id.*

[55] As for those ONA rules that have been in place over the last several years, they have already provided some indication of their lack of effectiveness: they have not prevented the Regional Companies from discriminating against their competitors in the few markets in which such discrimination was at all feasible. *See* Part IV, *infra.*

affecting behavior in an area that is characterized by technological change perhaps more than by any other factor.

Yet unless the rules are quite simple and straightforward, the Regional Companies will be able to contend, again and again, that any particular rule is not applicable to whatever anticompetitive practices they may be engaged in, and to tie up enforcement almost indefinitely in administrative proceedings and in litigation. This is not a mere theoretical concern. The evidence at the *AT & T* trial proved that it is possible to engage in endless dilatory maneuvers to preserve freedom of anticompetitive action even when the rules are relatively straightforward. And the voluminous files of this Court bear mute witness to the propensity of the Regional Companies to repeat claims and defenses, many of them frivolous, based on asserted distinctions from settled rulings.

As Professor Roger Noll of Stanford [56] points out in his affidavit (at pp. 32-33):

> Information services provide an especially poor candidate for BOC entry because of the complexity and diversity of the industry. Almost every supplier is likely to try to produce a unique information product —just as word processors, statistical packages, data base services, reference services, and home shopping services are all somewhat different. This diversity, driven by differences among consumers in the kinds of services they most desire, makes discriminatory practices, strategic cost accounting among services, and unwarranted self-dealing financially attractive to a BOC, but especially difficult to prevent, or even to

[56] Among his other achievements, Professor Noll is currently supervisory editor of *Information Economics and Policy*, the journal of the International Telecommunications Society, he participated in the President's Task Force on Telecommunications Policy, and he consulted for the Department of Justice by way of developing market definitions for use in the *AT & T* case, and for the Federal Communications Commission as a special adviser to the chairman.

> detect. To the extent local telephone companies have *any* discretion in selecting cost allocation methods, in varying service quality among information service providers, or in biasing the technology of local networks in favor of their own information services, they are certain to do so for two reasons. One is the absolute certainty that some such strategies will succeed. The other is that such strategies, even if detected, will provide an interim period of excess profits because they impose handicaps on rivals and raise entry costs in the form of litigation to induce regulators and courts to overturn the offending practices.

The Court is convinced by the Noll analysis; indeed, it regards conclusions based on the facts which underlie that analysis as well-nigh irrefutable.

Experience has amply shown that regulatory enforcement proceedings often take years to complete and that, even then, the decisions that emerge are by and large only prospective in application. For example, a tariff becomes effective immediately upon its filing by a Regional Company, and absent unusual circumstances and special action, it remains in that status until all FCC proceedings have been completed (and possibly court reviews as well).[57] It was for that reason, among others, that the Department of Justice in 1982 sought structural relief in its proposed consent decree. While the Court is reluctant

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[57] The Regional Companies are almost never penalized for engaging in anticompetitive behavior even if ultimately they lose before the regulators. *See* Affidavit of Nina Cornell at 30 (Exhibit 2 to MCI Opposition). In voice messaging, for example, BellSouth delayed making available to its competitors a special feature until it was ready to compete in the market. *Id.* at 14-15. BellSouth also provided a call forwarding feature to its competitors under a tariff which raised these competitors' costs by as much as 900%. Cornell Affidavit at 12. The company withdrew the tariff from operation in Florida, but that same tariff is still in effect in other states. *Id.* at 12.

to cite to the AT & T experience (*see* Part VII-C, *infra*), it cannot help but observe that with respect to the efficacy of regulations to rein in a determined telecommunications monopolist, the situation is today essentially what it was before the divestiture, and that, to the limited extent that there has been any change, it has been, on balance, toward a diminution in the effectiveness of regulation.[58]

D. Justice Department Contentions

In an area where the pre-divestiture record unambiguously proves that regulation could not restrain the monopolists' anticompetitive activities, and where no substantial record has been developed since that time, the Department of Justice advances a group of contentions that singularly lack merit. The Department contends, first, that there is no basis for concluding that the Regional Companies will not, for the most part, conform their activities to the FCC's rules (Reply Brief at 37-38); second, that the FCC has received no complaints with respect to the information services authorized by the March 1988 decree modification (Reply Brief at 38); and third, that while the FCC received other complaints regarding Regional Company anticompetitive conduct, they should be ignored for a variety of reasons (Reply Brief at 43).

As concerns the first and second points, they have no substance because the only activities in which the Regional Companies were allowed to engage since they became in-

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[58] To be sure, unlike its most recent predecessors, the current Federal Communications Commission does not appear to be viscerally opposed to the very regulation it is charged with administering. However, the problems with regulation in the telecommunications market are primarily the systemic ones described above; they do not depend, except at the margin, on the abilities and good intentions of the regulators. In the 1960s and 1970s, the FCC appears to have been committed to making regulation work, but as the *AT & T* trial record shows, the Commission was incapable of neutralizing the Bell System's anticompetitive activities.

dependent entities in 1984 were of the type with respect to which this Court had expressly concluded that they would provide no realistic opportunity for anticompetitive conduct.[59]

Primarily relied upon by the Department is the Regional Company experience with CPE.[60] But that product does not present a valid analogy in the present context because the Regional Companies are only allowed to sell CPE, not to manufacture it. It was precisely because the manufacture of the product would have given them the ability to engage in anticompetitive activities, while the sale of CPE manufactured by others would not, that the Court eliminated from the proposed consent decree the prohibition on the latter but not on the former. As the Court said at the time:

> The proposed decree would also prohibit the Operating Companies from selling or leasing customer premises equipment. . . .
>
> Anticompetitive activities undertaken by two separate corporations rather than by two components of the same corporation are likely to be far more difficult to accomplish because of increased problems of coordination and the greater possibility of detection. For example, it would be quite difficult for an Operating Company to conspire successfully with a man-

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[59] If the Department's belief in the Regional Companies' good intentions is intended to extend also to the record of the companies when they were still a part of the Bell System, it is of course contradicted by almost every paper the Department filed in the *AT & T* case.

[60] The affidavit of Professor Franklin Fisher cites, in addition to CPE, experience with the Yellow Pages, voice messaging, videotex, pay phones, cellular phones, and PBX, contending that in none of these have the Regional Companies attained market power. The reasons cited above for concluding that the Regional Companies lack the ability to engage in anticompetitive activities with respect to CPE apply to these other products and services as well.

> ufacturer to provide advance information about revised network standards or to impose interconnection restrictions which favored that manufacturer's products and no one else's.

552 F.Supp. at 191 (footnotes omitted).

As indicated, the Regional Companies also refer to the experience of GTE which, it is said, has not discriminated in spite of the fact that it is not bound by line of business restrictions.[61] However, when the Court, at the request of the Department of Justice, permitted GTE to engage in interexchange and information services, it did so on the basis that the company would not have the ability to engage in anticompetitive actions with regard to these services, largely because of its dispersed geographical base. *United States v. GTE Corp.*, 603 F.Supp. 730, 734 (D.D.C. 1984).

In the Court's view, no valid conclusion can be drawn from Regional Company non-discrimination in a market that provides no opportunity for discrimination. To put it another way, it is difficult to understand by what process of reasoning a finding of future lawful conduct with respect to activities providing ample opportunities for discrimination can be drawn from past experience with respect to activities which offer no such opportunities.

As for the Department's third argument, it, too, is specious. Essentially the Department states that when the FCC finds complaints of improper Regional Company activity to be well taken and acts upon them, this is proof that regulation is effective; when the FCC rejects particular complaints, this demonstrates that the complaints have no merit; and when the complaints are still pending administratively, it should be assumed that they will be resolved appropriately.[62] However, the regulations cannot

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[61] Regional Companies Reply at 37-38.

[62] Reply Brief at 43.

be pronounced effective merely because the FCC dealt, somehow, with a minute number of complaints, nor does rejection of complaints prove their lack of worth or their pendency support the assumption that, some day, they will be properly resolved. The sad history of regulation in this field proves at least that much.

More fundamentally, had the Department suggested so circular an approach around 1980, it would have been unnecessary to hold the *AT & T* trial, for whatever the evidence, the Bell System would have prevailed on that kind of rationale. But the Department did not make that argument then—indeed, it would have greeted such an argument, if made by AT & T, with scorn and ridicule—and the Court will not credit that argument now.

Finally, both the Department and the Regional Companies contend that, in any event, should regulation fail, the antitrust laws themselves would provide a significant deterrent to Regional Company anticompetitive conduct.[63] The Court does not consider it a valid basis for dissolving a significant part of a prophylactic antitrust decree that a new antitrust suit could some day be brought, presumably to result after years of litigation in a new decree, which would then again be dissolved upon hopes or professions of good behavior, and so on *ad infinitum*.

E. State Regulation.

State regulation is also likely to be ineffective in the current context. State regulators, who in the main must perforce operate with meager resources, but who are nevertheless responsible for the regulation of the bulk of Regional Company services, have consistently been unable, despite the best efforts of some, to exercise control over the vast and powerful Regional Companies. One

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[63] Department Reply Brief at 43-44; Regional Companies Reply Brief at 61-62.

basic reason for this impotence, in addition to the paucity of resources, is the fact that each of the Regional Companies operates in several states, and all of them are thus effectively beyond the jurisdiction of any single local regulatory body. Indeed, some of these companies, *e.g.*, US West, have refused to turn over to state regulators their records pertaining to operations within the region but outside of the particular state. *See* 673 F.Supp. at 569 n. 198. Beyond that, if federal regulators are not able to prevent anticompetitive conduct by the financially mighty and politically influential Regional Companies—in many areas the most powerful private entities extant—one would have to be an incurable optimist to suppose that state regulators could do so.

For these reasons, it is the finding of the Court, based on the evidence before it, that neither FCC nor state regulation can be expected to prevent anticompetitive activities by the Regional Companies.

IV

Anticompetitive Conduct by Regional Companies

Where the Regional Companies have been permitted to engage in activities because it appeared to the Court that the likelihood of anticompetitive conduct was small, they have nevertheless already managed to engage in such conduct, albeit necessarily on a limited scale.

The affidavits submitted by some of the intervenors report that in the voice messaging market the Regional Companies have designed technical features in such a way as to render them incompatible with competitors' standard equipment; [64] priced the features in such a man-

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[64] Affidavit of Nina Cornell at 10; Affidavit of Richard Press at 2-3; Affidavit of Frank Brooks at 6-7 (Exhibits 2, 9, and 6 to MCI Opposition).

ner as to raise their rivals' costs;[65] made important and necessary features available only to their own affiliates;[66] and delayed implementation of features requested by competitors until the particular Regional Company was ready to enter the market.[67] At least two Regional Companies charge more to the customers of their competitors for needed features than they charge their own customers,[68] and this, too, has had the effect of raising these competitors' costs. To add insult to injury, some Regional Companies use as a selling point with customers the unavailability of the features they are withholding from competitors.[69]

Significantly, some of this anticompetitive conduct is made possible by the Regional Companies' requirement that, to receive service, independent information providers must submit detailed technical and marketing information to Regional Company personnel who can then use these data to decide whether and when their company will provide competing services.[70]

Similarly, in the payphone market, the lines the Regional Companies provide to their competitors are in-

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[65] Cornell Affidavit at 11-12; Hall Affidavit at 31-32 (Exhibit 1 to MCI Opposition); Brooks Affidavit at 3, 6. As indicated above, note 57, in one state, access tariffs were raised by over nine hundred percent.

[66] Cornell Affidavit at 7-8; Affidavit of Rubie Czerwinski at 1-4 (Exhibit 7 to MCI Opposition); Brooks Affidavit at 2-3, 5, 7.

[67] Cornell Affidavit at 7-8. Ms. Cornell identifies the "Call Forwarding Busy Line" and "Call Forwarding Don't Answer" features as among those that the Regional Companies had the technology to implement in 1985, but failed to implement until 1988, when they were first allowed in the voice messaging market. *See* Brooks Affidavit at 2-3; Czerwinski Affidavit at 2-3; Affidavit of Michael Hydock at 2-4 (Exhibit 4 to MCI Opposition).

[68] Czerwinski Affidavit at 3-4; Press Affidavit at 1.

[69] Brooks Affidavit at 8.

[70] Cornell Affidavit at 33-34; Hall Affidavit at 42-43.

ferior in critical respects to the lines they use themselves.[71] In the audiotex market, independent providers report that the Regional Companies are delaying the servicing of their lines and are rendering the servicing and billing as inconvenient for them as possible; [72] and, just as the Bell System denied FX (foreign exchange) and CCSA (common control switching arrangement) connections to MCI,[73] Regional Companies are now denying to their competitors interconnections comparable to those that the Regional Companies themselves enjoy.[74]

In response, the Regional Companies explain that complaints about the alleged anticompetitive actions in the voice messaging market were either not specific enough to be investigated [75] or were resolved through regulatory commissions.[76] The Regional Companies further claim that they now provide enhanced features on an equal basis pursuant to tariffed rates,[77] and that they have ceased the anticompetitive activity.[78] The companies also describe the anticompetitive actions in the audiotex market as isolated incidents of customer service problems, and they

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[71] Cornell Affidavit at 17.

[72] Affidavit of Dale Larson at 8-10 (conduct of U S West); Affidavit of Karen Stabley at 5-6 (conduct of Bell Atlantic) (Exhibits to American Newspaper Publishers Association Opposition).

[73] This was an important item of proof in the *AT & T* trial. 524 F.Supp. at 1355.

[74] Cornell Affidavit at 22.

[75] *See* Exhibit No. 13 to Regional Companies Reply Affidavit Response No. 31.

[76] *Id.* at Response No. 27.

[77] *Id.* at Response No. 25, 32. As for the failure to make enhanced features available until the Regional Companies themselves were able to enter the market, the answer given is that Southwestern Bell provided these features through a special arrangement until there was enough demand to warrant the filing of a tariff.

[78] *Id.* at Response No. 24, 33.

contend that there was no intent to "inconvenience" the information service provider.[79] As for payphones, the Regional Companies explain that the problems have been settled through state regulators[80] or are currently being considered by regulators and the courts.[81]

It is surprising that the Regional Companies have succeeded in engaging in any anticompetitive conduct because until now they have been permitted to operate only in severely limited markets with respect to which such conduct appeared to be unlikely. But certainly the incidents that have thus far been brought to light—at a time when the Regional Companies knew full well that the Court was present and prepared to take action with respect to the still existing information services restriction—buttress the conclusion that to remove the restriction on the vast and complex information services field would be to court a significant risk of anticompetitive activities on a substantial scale, with equally substantial injury to competition.

V

Cross-Subsidization

The Regional Companies claim that they will not be able to force competitors out of the information services market through cross-subsidization and predatory pricing; that anticompetitive behavior would be detected and prosecuted by regulators; and that their potential competitors in the market are other large corporations with substantial resources which could withstand a predatory pricing strategy.[82]

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[79] *Id.* at Response No. 20.

[80] *Id.* at Response No. 44.

[81] *Id.* at Responses 45, 46.

[82] Hausman Affidavit at 6-7 (Exhibit to Regional Companies Motion); Affidavit of Sanford Grossman at 3 (Exhibit 7 to Regional Companies Reply).

There can be no question but that, due to the limited effectiveness of regulation (as discussed in Part II, *supra*), it would not be difficult for a Regional Company which is so inclined to divert ratepayer funds to its competitive enterprises, including its information services activities. The consequence of such diversion would be to enable the company to undersell its independent rivals in the information services market long and effectively enough to drive them from the market.

The Department of Justice argues, citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), that such a scheme would not be successful, for the predator could not keep incurring losses for a sufficiently long period to drive out competitors and to keep them out. It is certainly true that, as the *Matsushita* Court stated, such schemes "are rarely tried, and even more rarely successful." *Id.* at 589, 106 S.Ct. at 1357. That broad rule surely applies in most situations where one enterprise seeks to eject another from a particular market by predatory pricing.

One of the prerequisites to a strategy of predatory pricing is that the predator must have the "financial staying power" to outlast its competitors. Areeda & Turner, "Predatory Pricing and Related Practices Under Section 2 of the Sherman Act," 88 *Harv.L.Rev.* 697, 698-99 (1975). But as the Department of Justice recognized in 1981, a regulated monopoly whose revenues are determined through rate of return regulation has "almost limitless staying power." Government's Opposition to Defendants' Motion to Dismiss at 206 note * (filed August 16, 1981).

Staying power is certainly present in a situation such as that involved here, where a Regional Company, engaged in both competitive and noncompetitive markets, has the ability to make up for losses in the competitive arena

indefinitely, or certainly as long as necessary. All it takes to achieve that objective is the ability to transfer funds to the information services enterprise from the noncompetive local operations accounts that are periodically replenished by the ratepayers.

Here again, the Department of Justice previously understood and championed this reasoning. *See* Government's Opposition to Defendants' Motion to Dismiss (in the *AT & T* case) at 206 (filed August 16, 1981), where the Department said that "[u]nlike an unregulated firm, which must forego current profits to engage in below cost pricing, AT & T is subject to an overall earnings ceiling. It therefore has the ability, virtually indefinitely, to subsidize the prices of its competitive services with earnings from services in which it faces little or no competition—without sacrificing current profits." If the term "AT & T" is replaced by "a Regional Company," the quotation quite snugly fits the present situation.[83]

The only obstacle to such subsidization that has been suggested is that of regulatory oversight, that is, that the state regulators will not permit the Regional Companies to engage in such activities.[84] But as discussed in Part III-E, *supra*, the barriers to effective state regulation are so fundamental and pervasive that such regulation cannot be depended upon to stand in the way of strategic entry deterrence by the Regional Companies (any more than

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[83] The FCC plan to replace overall earnings ceilings with price caps has not yet been fully implemented. Even when it is, the Department's former cross-subsidization analysis will still apply.

[84] The Department of Justice professes not to know whether cost shifting opportunities will raise or lower prices in an information services market. Department Reply Brief at 64. But it is perfectly obvious that, while such strategies will in the short run lower price—as, for example, also does "dumping" by foreign firms—in the long run they permit the extraction of much higher prices and profits following the elimination of competitors from the market.

regulation was capable to standing in the way of similar activities by the Bell System).[85]

VI

Consequences of a Removal of the Restriction

A. Decrease in Competition

According to the Regional Companies and the Department of Justice, far from revealing that removal of the information services restriction would be likely to lesssen competition, the record demonstrates that such removal would increase competition in the relevant markets. The claim is that upon removal of the restriction, the Regional Companies would be able to provide new and better services, including additional features in gateways, information content, and other features of benefit to a variety of businesses.[86] Further, it is said, such removal would provide an increased incentive for Regional Company innovation in network services that would benefit not only these companies but also non-Regional Company information providers. And in a similar vein it is contended that the availability and technological sophistication of information services for small businesses and residential customers—which allegedly are lagging behind those of other countries—would vastly improve if the Regional Companies were permitted into the market.[87]

Under the Court of Appeals mandate, some of these considerations may be regarded as irrelevant, because "the 'public interest' test must take its meaning [only]

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[85] *See* Hall Affidavit at 4-5, 9-10.

[86] Regional Companies Reply Brief at 31; Hausman Reply Affidavit at 27-28. Additionally, it is claimed that losses due to anticompetitive behavior by the Regional Companies will be outweighed by the benefits to the public from the Regional Companies' presence in the market. Fisher Affidavit at 6, 19-20.

[87] Department of Justice Reply Brief at 21-25.

from the antitrust laws." 900 F.2d at 308. However, to the extent that it is not entirely clear whether the points made are properly within or without the antitrust rubric,[88] the Court has considered them and has concluded that they are in error.

In the first place, the contention that it will take the Regional Companies to provide better information services to the American public can only be described as preposterous. The Regional Companies have no experience in the content or substance of information, whether it be news, financial information, compilations of materials of various kinds, or the provision of interactive services, and neither had the Bell System when the local telephone companies still operated under its umbrella. To be sure, the Regional Companies have experience in the transmission and dissemination of information, but they have been permitted to be active in that market since the Court so ruled in 1988.

In any event, far more probable than the realization of the Regional Companies' claims is the possibility that, once they are allowed to enter the information services market, many of those who now provide such services and which currently make the market so "robust and rapidly expanding" [89] will be driven out of business by the anticompetitive strategies which, on the basis of past experience, the Regional Companies will likely adopt. As a consequence, competition in the market will suffer or be extinguished.[90]

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[88] Some factors have been determined by the Court of Appeals as being plainly without that rubric (*e.g.*, the welfare of local ratepayers) and others are clearly appropriate antitrust considerations (*e.g.*, the power to raise price). With respect to still other subjects (*e.g.*, provision of better services and other benefits to the public) the answer is not certain.

[89] Regional Companies Reply Brief at 2.

[90] After the independents have been eliminated from the market, the American consumer is likely to be faced with sharply reduced

Moreover, the Court considers the claim that the Regional Companies' entry into information services would usher in an era of sophisticated information services available to all as so much hype. Experience suggests that once these companies have achieved the removal of the information services restriction, ample reasons will be found and cited why the more expensive promises could not be fulfilled.[91]

In the opinion of this Court, informed by over twelve years of experience with evidence in the telecommunica-

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choices in information services: the Regional Companies will have no incentive to inaugurate new or innovative services (just as their predecessor AT & T had no incentive to provide and was slow in providing new services and products when it had monopoly control over the local exchanges and was thereby enabled to keep out competitors in long distance and manufacturing). This problem will in the present instance be exacerbated by the fact that because information services are expensive to develop and relatively cheap to disseminate, the Regional Companies will have little incentive to develop new services once competitors have been forced out of the market. Noll Affidavit at 14.

[91] Some of the Regional Companies have been quite ready since the beginning of the decree construction and waiver process to make claims that were repudiated as soon as they had served their purposes.

For example, in response to this Court's September 10, 1987 opinion on information services, the assertion was made that all the companies needed in order to facilitate the provision to the American people of the most advanced information services was a relaxation of the restriction on the transmission of such services. *See, e.g.,* Proposed Order and Explanatory Memorandum of U S West filed October 15, 1987. However, immediately upon the achievement of that goal, a drumbeat of arguments was heard that there was also an absolute necessity for the companies' entry into information content. The claim was made and endlessly repeated that, unless they were also permitted to generate information, they had not received all that was their due, and the American public was being shortchanged with respect to information services. The prediction made now that the entry of the Regional Companies into information services will yield vast benefits to the American public must be evaluated in the light of that experience and others of a similar nature.

tions field, the most probable consequences of such entry by the Regional Companies into the sensitive information services market will be the elimination of competition from that market and the concentration of the sources of information of the American people in just a few dominant, collaborative [92] conglomerates, with the captive local telephone monopolies as their base. Such a development would be inimical to the objective of a competitive market, the purposes of the antitrust laws, and the economic wellbeing of the American people.

B. Comparison With Foreign Information Systems

The Regional Companies also complain that the information services restriction has resulted in the United States falling behind other countries in the provision of information services. In this regard they point particularly to the French Minitel system with its inexpensive monitors in several million homes and businesses [93] as pointing to the path that should be followed here. However, the fact is that in France the state-owned company which transmits the information does not also generate it; its sole function is transmission. The French system should thus be seen as a videotex gateway system paralleling the system the Regional Companies have been permitted to provide since 1988; it is not an enterprise that generates the information that it transmits.

If the Regional Companies were permitted both to generate information and to transmit it, they would, certainly as of now, appear to be the only entities in the developed world to have this kind of a stranglehold on information.

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[92] Bellcore, the joint Regional Company research arm, will be a ready vehicle for achieving joint control of the information services market.

[93] *See* Hausman Affidavit at 97-98 (Exhibit to Regional Companies Motion). The monitors were furnished to consumers free of charge by the government-owned telephone company.

The present era is increasingly being described, with considerable accuracy, as an Information Age, with information more and more a central feature of the economy.[94] That being the case, it would hardly make sense or be in the public interest to cancel an important part of an antitrust decree forged after several decades of on-and-off litigation, and turn a key ingredient of the emerging information society over to corporations who not so long ago were involved in major violations of the antitrust laws, and who even now seem ready to engage in anticompetitive practices whenever the opportunity therefor presents itself. Indeed, it would be difficult to conceive of a step that would be less in the public interest.

VII

Ruling in Accordance With Appellate Mandate

For the reasons stated in Parts I through VI above, were the Court free to exercise its own judgment, it would conclude without hesitation that removal of the information services restriction is incompatible with the decree and the public interest. However, as will now be explained, the Court is not free to exercise its own judgment. Indeed, it has concluded that several rulings of the Court of Appeals in its 1990 opinion, as detailed *infra*, leave it no choice but to remove the restriction. Regardless of its own views of the law and the facts, this District Court, like all trial courts, is of course bound to follow and implement directions from appellate tribunals.[95] And the Court has concluded that, if it is to be faithful to the directions of the Court of Appeals, it must grant the

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[94] This appears also to be true of such aspects of national life, to a greater or lesser degree, as entertainment, politics, and national defense.

[95] In addition to its legal duty to follow that course, this judge is also mindful of the several district judges in various Southern states who, in the years following *Brown v. Board of Education*,

Regional Companies' motion. It will accordingly do so, albeit with considerable reluctance.

Under the appellate mandate, the "burden of proof" issues are of decisive importance. It is telling in that respect that both the Department of Justice and the Regional Companies have concentrated in their written and oral submissions to this Court upon these issues, as distinguished from substantive ones. *See, e.g.*, the Regional Companies Reply Memorandum which begins as follows: "The central issue raised in intervenors' brief is one already settled by the Court of Appeals: the standard of review. Intervenors ask this Court to second-guess the Justice Department's policy judgment that removal of the information services restriction is now in order." [96] As will be seen below, in view of the language of the appellate opinion, that assessment is not inaccurate.

The particular appellate rulings which, in the opinion of this Court, leave it no choice other than to remove the restriction, are as follows. First, rather than to leave the Court free to weigh the evidence and the law proffered by all the parties, preferring one over the other only on the basis of credibility, logic, consistency with known facts, and similar qualitative factors, the appellate decision requires the Court to accord special weight and deference to the views of the Department of Justice. Second, rather

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347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), and other Supreme Court and Court of Appeals rulings on civil rights issues, stubbornly refused to follow these rulings. These were entirely inappropriate courses of action, and this judge has no desire to emulate them.

[96] Regional Companies Reply at 1. The same theme is repeated again and again. *See, e.g.*, Reply Brief at 3 ("In light of the complex, multi-factored, judgmental character of the Department's policy determination, and the impressive array of support that determination has received, no one could reasonably conclude that removal of the information services restriction is 'certain to lessen competition,' ").

than to permit the Court to make its decision on the antitrust issues by the standard of probability of outcomes, the appellate decision requires the Court to remove the information services restriction unless there is certainty that entry of the Regional Companies into the information services market will lead to anticompetitive conduct by these companies. Third, rather than to allow the Court to consider substantially the actual performance of the local telephone companies when they were still part of the Bell System, the appellate decision requires the Court to accord primary weight to the necessarily theoretical present-day forecasts of economists. Each of these factors will now be explained in somewhat more detail.

A. Deference to Department of Justice

The Court of Appeals has ruled that this Court must approve the proposed lifting of the information services restriction if the proposal satisfies the "public interest" standard of the Tunney Act. 900 F.2d at 295. Among the significant provisions of that Act is section 16(e) of title 15 of the United States Code, which directs that proposed antitrust consent decrees in government cases may not become effective unless they are approved by the court having jurisdiction of the underlying lawsuit. Indeed, it is plain from the statute and its legislative history that a court, rather than being a "rubber stamp" for the Department of Justice, is required to act as an independent check on the terms of such decrees. *United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131, 148-49 (D.D.C. 1982); *see United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983).

The legislative history of the statute shows that the Congress was disturbed that antitrust consent decrees had sometimes failed to provide appropriate relief, either because of miscalculations by the Department of Justice or because of the "great influence and economic power" wielded with respect to that department by antitrust

violators.[97] That history, moreover, is replete with examples of Justice Department support of companies with great economic as well as political power. Congress took particular note in this regard of the history of the ITT consent decree which was negotiated under questionable conditions,[98] and of the 1953 phase of the AT & T litigation, in which the then Attorney General settled the case under dubious circumstances on the basis of "token" measures agreed to following private discussions.[99] It was to deal with such problems that Congress directed that antitrust settlements arrived at between the Department of Justice and private corporations were not to become effective unless the court having jurisdiction over the lawsuit found them to be in the public interest.

The Court of Appeals stated in its remand opinion in this case that this Court is required to defer to the Department of Justice on the issue of whether the proposed modification of the decree is in the public interest as that term is used in the Tunney Act.[100] It is the Department which is to weigh the various considerations, the Court

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[97] *See, e.g.*, S.Rep. No. 93-298, 93rd Cong., 1st Sess. 5 (1973); 120 Cong.Rec. 36341 (1974). Senator Tunney, the Act's sponsor, likewise pointed out why for various reasons the Department of Justice could often not be relied upon to do an adequate job. 119 Cong.Rec. 24598, 3451 (1973).

[98] *See* Note, *The ITT Dividend: Reform of Department of Justice Consent Decree Procedures*, 73 Col.L.Rev. 594, 603-06 (1973).

[99] In a meeting at the Greenbrier resort, the Attorney General told AT & T's General Counsel that he wanted to "get rid" of the antitrust case, and that AT & T should be able "readily [to] find practices that [it] might agree to have enjoined with no real injury to [its] business." Report of Antitrust Subcommittee of House Committee on the Judiciary at 53, 86th Cong., 1st Sess. January 30, 1959 (Committee Print).

See 552 F.Supp. at 136-37, including notes 8 through 14.

[100] 900 F.2d at 295.

being neither required nor permitted to determine whether the resulting array of rights and liabilities is the one that will best serve society. 900 F.2d at 309.[101] More specifically, the appellate court instructed this Court in broad terms to "seriously consider" the Department's judgment on issues "of economic analysis," on "predictions of market behavior," 900 F.2d at 297,[102] and on the effectiveness of FCC regulations, 900 F.2d at 298,[103] the basis therefor [104]

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[101] The Court of Appeals stated in this connection that District Courts were to decide only whether the settlement is within the reaches of the public interest. 900 F.2d at 309.

[102] In this respect, the Court of Appeals relied in part upon the assumption that this Court *required* the Department to report to the Court every three years concerning the need for the restriction. 900 F.2d at 297. That assumption is mistaken. The Department of Justice volunteered to provide such reports; they were never required. 552 F.Supp. at 195.

[103] Elsewhere, the Court of Appeals again emphasized that on the issue of the efficacy of the FCC regulations the Department of Justice's assessment is entitled to significant weight, and it went on to affirm various conclusions reached by this Court on the basis that the Department agreed with this Court and there was no reason to doubt the assessments made thereon by the *Department of Justice*. 900 F.2d at 309. Similarly in postponing judgment on the efficacy of FCC regulations, the Court of Appeals said that it thought it "more prudent to await *the DOJ's assessment* in subsequent Triennial Reviews." 900 F.2d at 298 (emphasis added).

[104] The Court of Appeals further relied on the conclusion that it was an "institutional anomaly" for a District Court to evaluate the effectiveness of an agency's regulatory program, but that there was no such anomaly when the Department of Justice conducts such an evaluation. 900 F.2d at 298. Courts pass on and otherwise evaluate federal agency programs in a great variety of situations; indeed a substantial proportion of the docket of the Court of Appeals consists of such cases, and they likewise appear with some frequency in the district courts, both here and elsewhere. However, such an evaluation by another Executive department in the course of litigation, particularly litigation concerning a judicial decree, is unusual.

being that the Department might be expected to be more expert than the Court in these fields.[105] 900 F.2d at 298.

In light of these appellate directions, the Regional Companies are drawing reasonable conclusions when they assert that, "unless the relief requested by the Department is plainly outside the bounds of rational policy choice, the Department's motion must be granted, whether or not the District Court believes that the Department is making a mistake;" [106] when they state that the Court of Appeals "has directed this Court simply to determine whether the Department's judgment [that removal of the information services restriction is now in order] is within 'the zone of settlements consonant with the public interest today;' " [107] and when they contend that "[i]n view of the substantial deference that is due to the Department of Jusctice in this field of economic prediction and inexact science, no amount of discovery or trial testimony would permit the Court to upset the Department's reasoned

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[105] While a party to litigation may not infrequently be more familiar with the intricacies of particular facts and law than a court, it has never been suggested that this circumstance requires a court to give deference to the conclusions reached by such a party. Even where an agency is charged with the administration of a particular statute, its interpretations and litigating positions are not entitled to judicial deference if such positions, as here, are "unsupported by regulations, rulings, or administrative practice," *Georgetown University Hospital v. Sullivan*, 934 F.2d 1280, 1283 n. 3 (D.C.Cir.1991). Here, of course, we are dealing with the interpretation of a judicial decree—not a subject under Department of Justice administration. Moreover, while that Department may have greater expertise than the courts on antitrust matters in general, this is not likely to be true of the law and the facts governing this particular case which has been under the Court's continuous jurisdiction for over a decade.

[106] Reply Brief at 13.

[107] Reply Brief at 1 (quoting 900 F.2d at 307) (emphasis omitted).

evaluation of the competitive risks and benefits of RBOC entry."[108]

It is in that context that this Court must consider the determinations of the Department of Justice with respect to the subjects on which, under the appellate decision, the Department is entitled to deference.

The Department's principal determinations on these subjects are as follows:

> The fact that competitors depend on Regional Company bottleneck facilities is not in itself sufficient to establish a risk of anticompetitive discrimination, particularly because alternatives[109] are available.[110] The risk of discrimination is minimal since adequate legal or regulatory constraints are present.[111] Any selective degradation of service or the grant of priority to the Regional Company's own information service would be difficult to implement, particularly in view of the FCC's ONA and *Computer III* regulations.[112] There is no evidence that the Regional Companies would act in concert so as to discriminate in the information services field.[113]

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[108] Reply Brief at 86-87.

[109] Motion at 19-20, 30. The Department concedes, however, that it "cannot conclude at this point that alternative transmission media would in themselves effectively constrain BOC discrimination against most information services providers." Motion at 33.

[110] Motion at 15, 30. On the other hand, the Department has concluded that the risk of anti-competitive discrimination against information service providers is not substantial, because these providers could reach their customers through various types of indirect connections—a conclusion that seems to be at odds with one noted in note 109, *supra*.

[111] Motion at 22.

[112] Motion at 22-27.

[113] Motion at 29.

> No substantial risk is present that competition would be impaired by Regional Company cross-subsidization because of FCC regulatory oversight and because few facilities and personnel will be shared between the Regional Companies' exchange operations and their information services.[114]

It is this Court's conclusion that none of these contentions is supported by credible evidence in the record, and the Court finds instead, for the reasons elaborated on in Parts I through VI above that, should the restriction on information services be removed, the Regional Companies would have the incentive and the ability, notwithstanding regulatory constraints, to engage in anticompetitive acts on a substantial scale. Nevertheless, in view of the strong and hardly routine Court of Appeals admonitions, this Court has no choice but to defer to the current conclusions [115] of the Department of Justice on these issues.

B. The Issue of Certainty

This determination is strengthened by the appellate emphasis on certainty. The Court of Appeals has ruled that the "appropriate question under section VII [of the decree] is whether the proposed modification would be *certain* to lessen competition in the relevant market," 900 F.2d at 308 (emphasis added), that is, whether Regional Company entry into the information services market would be *certain* to have the effect of raising price or restricting output in that market.

The intervenors point out that the test under traditional Supreme Court and other appellate decisions with respect

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[114] Motion at 33-35.

[115] As the Court has preivously noted, when the decree was drafted, adopted, and implemented, and for several years thereafter, the Department expressed and urged upon the Court views that were precisely the opposite of its current stance on virtually every issue. Nothing occurred at the time of the Department's change in position other than a change in personnel.

to antitrust law involves "probabilities, not certainties." [116] *Brown Shoe Co. v. United States,* 370 U.S. 294, 323 n. 39, 82 S.Ct. 1502, 1522 n. 39, 8 L.Ed.2d 510 (1962); [117] *see United States v. General Dynamics Corp.,* 415 U.S. 486, 505, 94 S.Ct. 1186, 1198, 39 L.Ed.2d 530 (1974); *Federal Trade Commission v. Procter & Gamble Co.,* 386 U.S. 568, 577, 87 S.Ct. 1224, 1229, 18 L.Ed.2d 303 (1967); *United States v. Penn-Olin Chemical Co.,* 378 U.S. 158, 17, 84 S.Ct. 1710, 1717, 12 L.Ed.2d 775 (1964); *United States v. Aluminum Co. of America,* 377 U.S. 271, 280, 84 S.Ct. 1283, 1289, 12 L.Ed.2d 314 (1964); *United States v. Baker Hughes, Inc.,* 908 F.2d 981, 984 (D.C.Cir.1990). Indeed, the certainty standard may well be an impossible one; as the Court of Appeals recognized, economic analysis and market predictions are not an exact science (900 F.2d at 297).[118]

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[116] In fact, the Court of Appeals itself speaks of "anticompetitive *risks* associated with lifting the restriction," 900 F.2d at 309 n. 29 (emphasis added), a concept that would appear to be antagonistic to the certainty standard.

Moreover, although the burden of persuasion is normally on the proponent of a motion, and that proponent must make his case by a preponderance of the evidence, the appellate mandate places the burden on those opposing the Regional Company motion, and requires them to prove their position by a standard that exceeds even the beyond-a-reasonable-doubt standard applicable to criminal cases.

[117] While *Brown Shoe* involved section 7 of the Clayton Act, the Regional Companies themselves have stressed that contains a "closely analogous standard." Joint Brief for Regional Company Appellants at 54 (filed April 17, 1989), No. 87-5388 (D.C.Cir. 1990). *See also,* II P. Areeda & D. Turner, *Antitrust Law* para. 304a (1990).

[118] *See also,* the reference in the Regional Companies' Reply Brief to the "field of economic prediction and inexact science," quoted at p. 329, *supra.*

Even the President's Council of Economic Advisers, the Federal Reserve Board, and individuals and organizations that invest in the stock market have frequently discovered to their dismay that they are wrong: whatever they may hope for, they surely cannot be certain.

While, as discussed above, the evidence persuades this Court that entry of the Regional Companies into the information services market would allow them quickly to dominate that market and to eliminate both competition and the independents which would make that competition possible, the question under the appellate mandate is whether this Court is *certain* that removal of the information services restriction would have such an effect. The answer to that question is in the negative.

C. Conditions Today

The Court of Appeals opinion is critical of this Court's reliance on the fact that no change had been shown between the conditions that existed in 1982 when the decree was approved and 1987 when this Court issued the "triennial review" decision. 900 F.2d at 308. To remedy that defect, the appellate court held that removal of the restriction would have to be approved if the relevant rights and obligations are within the zone of settlements "consonant with the public interest *today*," 900 F.2d at 307 (emphasis in original), and further, that the "district court should determine whether removal of the information services restriction as applied to the generation of information would be anticompetitive under *present* market conditions." 900 F.2d at 309 (emphasis in original).[119]

It is not entirely clear how broad the Court of Appeals' direction was intended to be. On the one hand, by ruling out any reliance on the fact that no significant change had occurred since the direct evidence of the local operating companies' anticompetitive acts was presented at trial,[120] the appellate court may have also ruled out con-

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[119] Similarly, the appellate court contrasted removals under Section VII of the decree (which, it said, deals with public interest "today") with Section VIII(C) (which concern the question whether the ability to impede competition had changed from the time "when the decree was approved"). 900 F.2d at 307.

[120] The Court of Appeals said that there was "no record to speak of" in the *AT & T* trial regarding information services, and from

sideration of these earlier anticompetitive acts themselves. If there can be no reliance on the lack of change between 1982 and 1987, there can logically be no consideration of the situation as it existed in 1982.[121]

On the other hand, it is possible that, as the Department of Justice contends, the Court of Appeals intended to allow this Court to consider both the evidence of anticompetitive acts prior to 1982 and the evidence that has been added to the record since then.[122] But this would still leave the Court with the very difficult task[123] of basing its decision primarily on theoretical predictions[124]

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this premise it concluded that this Court lacked a factual basis in 1982 for the imposition of the information services restriction (absent the parties' agreement). 900 F.2d at 307. However, this Court noted when it approved that restriction at the Department of Justice's request that this restriction "is necessary for reasons similar to those justifying the restriction on interexchange services. . . ." 552 F.Supp. at 189. And there can be no question but that (1) insofar as the potential for anticompetitive conduct is concerned, the two types of services parallel each other, and (2) there was ample evidence of such conduct with respect to the interexchange market.

[121] Although a decision today regarding the removal of the information services restriction must be made on the basis of present conditions, it is difficult to do so while ignoring what occurred when the local telephone operating companies last had the opportunity to act in a discriminatory fashion on a significant scale because their bottlenecks on local exchange service gave them an unfair advantage. One way to take account of these events so as to bring them up to date is to inquire whether any material change occurred between then and now.

[122] Justice Department Reply Brief at 3-4.

[123] The Court of Appeals recognized that problem, stating that "it may be difficult to decide whether the BOCs would have [market] power if they were allowed to enter a market." 900 F.2d at 296.

[124] It is somewhat ironic that the Department of Justice complains that its opponents are relying "on economic theory alone," and that it counsels against the use of "economic theory divorced from the facts." Reply Brief at 15. The truth is that it is the

of hypothetical market power and hypothetical risks of improper conduct, all of it substantially divorced from the facts for which there is an evidentiary record.

The required focus on predictions on which the various experts are in disagreement thus adds to the weight that must be given to the Justice Department's judgments [125] and it further complicates the search for certainty.

* * * *

To sum up. It is the Court's judgment that in view of the requirements imposed by the Court of Appeals which are summarized above, it could not responsibly [126] and with proper deference to that court rule that the information services restriction must be retained. Accordingly, the Court is ordering simultaneously herewith that the restriction shall be removed.

VIII

The Need For A Stay

The Court will, however, stay the effect of its decision pending the completion of appellate review. While, as indicated, this Court is following what appear to be the most plausible interpretations of the several critical Court of Appeals directions, it must be recognized that some of these directions are not necessarily susceptible of but a single interpretation.

Department that wishes to escape from concrete facts—those that emerged during the *AT & T* trial and in the Tunney Act proceeding—and to rely instead primarily on predictions.

[125] The Department's judgments would obviously have less weight in the context of tangible evidence such as that of Regional Company anticompetitive conduct prior to 1982.

[126] The Court has rejected the alternative of construing the appellate opinion in such a way as to permit it to order the retention of the restriction. *See, e.g.*, Part VIII, *infra*. The Court feels obligated to interpret the opinion of the Court of Appeals as that tribunal most plausibly intended it to be interpreted.

For example, the intervenors argue, with some justification, that the "certainty" ruling may constitute a reference to the Court of Appeals' own obligations rather than those of this trial court. One of the Court of Appeals' references to the certainty standard clearly refers to that court's own obligations on appeal.[127] The references to the Department of Justice can likewise have several meanings: while this Court has been directed to give "serious consideration" to the Department's views on economic theory and on the efficacy of FCC regulation, the appellate court did not indicate what weight is to be given to the evidence adduced by other parties, or whether the term "serious consideration" is to be equated with "decisive effect" irrespective of other considerations. And again, as alluded to above, it may be that, in emphasizing that this Court was to make its findings with respect to current conditions, the Court of Appeals did not intend to rule out substantial consideration of the experience with anticompetitive conduct of the local telephone companies as revealed by the pre-1984 record.

For these reasons, while this Court is not prepared to depart from what appears to be the most plausible reading of the directions of the Court of Appeals (*see* notes 95 and 126, *supra*), and it therefore holds in favor of the Regional Companies, it cannot be certain that its interpretation of the dispositive appellate directions is correct. It follows, of course, that this Court cannot be certain of the correctness of its decision to remove the information services restriction from the decree.

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[127] Said the court, "because we *cannot be certain* that these findings were not infected by the court's legal error. . . ." 900 F.2d at 308 (emphasis added). On the other hand, elsewhere the appellate court's discussion of the certainty concept appears to have broader scope than a reference to appellate duties ("the appropriate question under section VII is whether the proposed modification would be certain to lessen competition," 900 F.2d at 308). *See also, United States v. Western Electric Co.*, 907 F.2d 1205, 1209 n. 7 (D.C.Cir.1990).

Yet if the Regional Companies were to enter the information services market while the critical issues are still as unsettled as they may well be, substantial funds could be spent in reliance on a decision which could subsequently be vacated, and corporate changes could take place on a like reliance both within the Regional Companies and by others now engaged in one or more of the many facets of the information services. It is appropriate, therefore, to stay the effects of this Court's current ruling until finality has been reached in the appellate process,[128] and the Court will do so.

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[128] The stay is entered on the assumption that one or more of the parties or intervenors will appeal, as has been the recent experience. Should appeals not be filed, the stay will of course be dissolved.

APPENDIX C

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 87-5388 through 87-5397 and
88-5276 through 88-5284

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, *et al.*,
COMPETITIVE TELECOMMUNICATIONS ASSOCIATION,
NATIONAL CONSUMERS LEAGUE
BLACK CITIZENS FOR A FAIR MEDIA,
Intervenors.

Appeal of PACIFIC TELESIS GROUP, *et al.*
(Two Cases)

UNITED STATES OF AMERICA

v.

WESTERN ELECTRIC COMPANY, *et al.*
(Eighteen Cases)

Appeal of NYNEX CORPORATION
(Two Cases)

Appeal of US WEST, INC.
(Two Cases)

Appeal of AMERICAN INFORMATION
TECHNOLOGIES CORPORATION
(Two Cases)

Appeal of BELLSOUTH CORPORATION
(Two Cases)

Appeal of PUBLIC SERVICE COMMISSION
OF THE DISTRICT OF COLUMBIA
(Two Cases)

Appeal of PEOPLE OF THE
STATE OF CALIFORNIA, *et al.*

Appeal of SOUTHWESTERN BELL CORPORATION
(Two Cases)

Appeal of BELL ATLANTIC
(Two Case)

Appeals from the United States District Court
for the District of Columbia
(Civil Action No. 82-00192)

Argued Dec. 6, 1989

Decided April 3, 1990

As Amended April 6, 1990

Before MIKVA, EDWARDS and SILBERMAN, Circuit Judges.

Opinion for the Court filed PER CURIAM.

PER CURIAM:

As part of the 1982 consent decree that severed the seven Regional Bell Operating Companies ("BOCs") from AT & T, the parties agreed that the BOCs, which inherited AT & T's local exchange monopoly, would be prohibited from providing interexchange (long distance) or information services, manufacturing telephone equipment, and participating in any non-telecommunications industry. The district judge retained jurisdiction over the case, and the Department of Justice ("DOJ") pledged to report to the court every three years as to the continuing need for these "line of business" restrictions. In the first such "Triennial Review," after considering the DOJ's report, as well as the comments of the other parties and dozens of other individuals and organizations, the district judge issued two opinions lifting the restriction against BOC participation in non-telecommunication businesses, modifying the restriction against their entering the information services market, and leaving intact the interexchange and manufacturing restrictions. *See United States v. Western Elec. Co.*, 673 F.Supp. 525 (D.D.C.1987);

United States v. Western Elec. Co., 714 F.Supp. 1 (D.D.C. 1988). With the exception of the district judge's ruling dealing with information services—which we reverse and remand—we affirm.

I.

A. *The 1982 Consent Decree*

In 1974, the DOJ filed this antitrust suit against AT & T. After seven years of pretrial proceedings, the case was tried in district court for eleven months but did not culminate in a verdict. Instead, the parties submitted a proposed consent decree to the court for review according to the "public interest" standard prescribed by the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16 (b)-(h) ("Tunney Act"). After extensive Tunney Act proceedings, and after the parties agreed to certain modifications added by the district judge, the district court approved the decree.[1] *See United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131 (D.D.C.1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001, 103 S.Ct. 1240, 75 L.Ed.2d 472 (1983).[2]

Although the district court made no explicit findings of liability in the course of the Tunney Act proceedings, it did examine whether the evidence was sufficient to warrant antitrust relief. *See* 552 F.Supp. at 161. The evidence indicated that AT & T or the "Bell System" was, at the time of the trial, a massive, vertically-integrated enterprise which enjoyed a monopoly in local exchange services, provided long distance service, designed and de-

[1] Although the district court never determined whether the Tunney Act was technically applicable to this case, the parties consented to have the Tunney Act procedures applied. *See AT & T*, 552 F.Supp. at 145.

[2] Justice Rehnquist, joined by two other justices, dissented from the Supreme Court's summary affirmance because they questioned whether the application of an undefined "public interest" standard falls within the judicial power under Article III. *See* 460 U.S. at 1001-06, 103 S.Ct. at 1241-44.

veloped telephone equipment (through Bell Laboratories), and manufactured that equipment at its wholly-owned subsidiary, Western Electric. AT & T used its local exchange monopoly—the so-called "bottleneck"—in a number of ways to promote its own affiliated operations in the long distance and equipment fields. In the interexchange field, other providers such as MCI were dependent on AT & T's local exchange facilities since there was no other way to reach the ultimate consumer. AT & T therefore had a strong incentive to provide more expensive or inferior quality local exchange access to its long distance competitors than it provided to itself. According to the DOJ, despite vigilant FCC attempts to prevent it, AT & T was able to discriminate againts its interexchange competitors and, in that way, to stave off significant interexchange competition. *See* 552 F.Supp. at 160-63.

In the equipment market, the BOC's purchased over eighty percent of the nation's central office switches and transmission equipment and nearly always purchased that equipment from AT & T's Western Electric affiliate, even when those products were more expensive or of lesser quality than equipment available from competing vendors. The BOCs and Bell Labs also preferred Western Electric over competitors by granting it early and otherwise advantageous access to technical data and other information about the BOC's equipment requirements. Finally, there was evidence that AT & T cross-subsidized its equipment prices offered by its Western Electric affiliate using its monopoly revenues from local exchange services, thereby enabling Western Electric to undersell its competitors while telephone consumers were effectively overcharged for their local telephone service. Again, all of this was apparently carried out notwithstanding the FCC's best efforts to stop it. *See* 552 F.Supp. at 190-92.

Under the consent decree, AT & T retained its long distance and equipment manufacturing operations but

agreed to divest itself of its local exchange monopoly, transferring those operations to the BOCs [3] which were to become totally separate from AT & T. In turn, the BOCs were to be limited to the provision of local exchange services and precluded from participating in the markets for interexchange (long distance) services,[4] equipment manufacturing, information services,[5] and all other non-telecommunications businesses. *See* 552 F.Supp. at 227-28. The BOCs were, however, permitted to provide—but not manufacture—customer premises equipment and also to produce, publish, and distribute "Yellow Pages" directories. *See* 552 F.Supp. at 231. These line of business restrictions were premised on the notion that because the BOCs still controlled the local exchange bottlenecks, there was a risk that they would engage in the same sort of anti-

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[3] Under the reorganization plan submitted by AT & T and approved by the court, the 22 BOCs were consolidated into seven Regional Holding Companies. *See United States v. Western Elec. Co.*, 569 F.Supp. 1057 (D.D.C.), *aff'd sub nom. California v. United States*, 464 U.S. 1013, 104 S.Ct. 542, 78 L.Ed.2d 719 (1983). For simplicity, we continue to refer to these Regional Holding Companies as the "BOCs."

[4] According to section IV(K) of the decree, " 'interexchange telecommunications' means telecommunications between a point or points located in one exchange telecommunications area and a point or points located in one or more other exchange areas or a point outside an exchange area." 552 F.Supp. at 229. "Exchange areas" are geographic areas of jurisdiction established by the BOCs according to criteria set out in the decree. *See id.*

[5] Section IV(J) of the decree defines "information services" as:

> the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

552 F.Supp. at 229.

competitive abuses that AT & T had. *See* 552 F.Supp. at 187-91.

Before approving the restrictions, the district judge scrutinized them carefully to ensure "that they will not actually limit competition by unnecessarily barring a competitor from a market." 552 F.Supp. at 186. He rejected as overly simplistic the DOJ's equation of the post-divestiture BOCs with the pre-divestiture Bell System based simply on the proposition that they both possessed a monopoly in local telecommunications. The separated BOCs, the district judge recognized, would be far more manageable monopolists for regulators to oversee than AT & T had been because they would be regional rather than national in scope, they would not be vertically integrated, and, if permitted to enter competitive markets, they would face "the most potent conceivable competitor: AT & T itself." 552 F.Supp. at 187. He therefore ruled that the Tunney Act's public interest standard would permit banning the BOCs from a market only if there was a substantial possibility that the BOCs would use monopoly power to impede competition in that market. 552 F.Supp. at 187. As part of that "public interest" analysis, the district judge undertook a two-part inquiry to determine for each market barred to the BOCs whether (1) the BOCs would actually have the incentive and opportunity to act anticompetitively and (2) whether the participation of the BOCs would contribute to the creation of a competitive market. *See* 552 F.Supp. at 187, 188-94. In addition, the district judge examined the effect of the restrictions on "important public policies." 552 F.Supp. at 187. The district judge ultimately determined that the proposed restrictions were indeed warranted.

The line of business restrictions were not meant necessarily to be permanent, however. The district judge retained jurisdiction [6] and insisted that a mechanism be

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[6] Section VII of the decree is entitled "Retention of Jurisdiction" and reads:

inserted into the decree for removing them at a later date. Rejecting the DOJ's view that mere monopoly power in local exchange services warranted the restrictions, the district judge thought that removal of the restrictions should be governed by a standard that allows a petitioning BOC to prove that there is no substantial possibility that the BOC could use its monopoly power to impede competition in the relvant market. *See* 552 F.Supp. at 195. The district judge therefore drafted, and the parties agreed to, section VIII(C) of the decree, which reads:

> The restrictions imposed upon the separated BOCs by virtue of section II(D) [the line of business restrictions] shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter.

552 F.Supp at 231. This removal standard was intended to supplant the "test usually applied to a contested modification of a consent decree," set out in *United States v. Swift & Co.* that asks whether " 'unforeseen conditions' " make modification appropriate. *See* 552 F.Supp. at 195 n. 266 (quoting *United States v. Swift & Co.*, 286 U.S. 106, 119, 52 S.Ct. 460, 464, 76 L.Ed. 999 (1932)). Whether section VIII(C) would also apply to *uncontested* modifications is a question upon which the district court was silent in 1982.

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Modification of Final Judgment, or, after the reorganization specified in section I, a BOC to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Modification of Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

552 F.Supp. at 231.

B. *The Triennial Review*

When the decree was entered, the DOJ pledged to report to the court on the third anniversary of divestiture and every three years thereafter on the continuing need for the line of business restrictions. Since divestiture was not actually accomplished until 1984, the first such Triennial Review was held in 1987. The DOJ hired an independent consultant, Peter Huber, to conduct in-depth research on the telecommunications industry as a whole as well as on each of the relevant sub-markets. The *Huber Report* provided the factual basis for the DOJ's preliminary submission, filed with the district court in February 1987, in which it recommended the complete removal of the manufacturing, non-telecommunications, and information restrictions as well as the modification of the interexchange restriction. Quite clearly, the DOJ's position—which conceded the continued existence of the BOCs local exchange monopoly—represented a significant change from its position when the decree was entered that mere monopoly power in local exchange services necessitated the restrictions.

After studying the comments of the parties and intervenors on its recommendations, the DOJ formally moved the court—apparently under section VIII(C) of the decree—for the removal of all the line of business restrictions, with the exception of the interexchange restriction. The DOJ was evidently persuaded to alter its position on interexchange services, and it instead asked the court to leave the restriction intact but to grant waivers as soon as local regulation in a given area is lifted. The Department believes that the BOCs' bottleneck monopolies persist primarily because of local regulation which, if removed, would allow potentially competitive access alternatives to be made available by new technology. The seven BOCs also filed motions under section VIII(C) of the decree asking for complete removal of all the line of business restrictions.

The district court held proceedings in which interested persons were invited to comment and respond to the report and the motions. With respect to the non-telecommunications and information services restrictions, all of the parties to the original decree—AT & T, the BOCs, and the DOJ—as well as the FCC agreed that the restrictions should be removed.[7] AT & T opposed any modification of the other restrictions, thus making those BOC motions undeniably "contested." Not surprisingly, numerous existing participants in the markets that the BOCs sought to enter intervened and vigorously opposed each of the proposed modifications. And, as noted above, the DOJ opposed the complete removal of the interexchange restriction.

After discussing the standard for removal of restrictions under section VIII(C) of the decree, the district judge determined that the BOCs still possessed a bottleneck monopoly over local exchange service. *See* 673 F.Supp. at 536-40. The court then analyzed each line of business restriction to decide whether the BOCs had nevertheless met their burden under section VIII(C) to warrant removal. In reviewing the restriction concerning nontelecommunications businesses, the court noted that it had routinely reviewed and granted requests to waive this restriction since the decree became operational in 1984. Despite losing the safeguards that the waiver process afforded by virtue of the conditions imposed whenever a waiver was granted,[8] the district court removed the restriction entirely because potential competitors did not actively

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[7] AT & T stated that it did not oppose information services relief for the BOCs but argued that any modification of that restriction should be made pursuant to section VII of the decree, not under section VIII(C).

[8] The court normally required the BOCs to operate the competitive business through a separate subsidiary that would obtain its own debt financing. Furthermore, the total net revenues for all

oppose the removal and because cross-subsidization is more difficult in enterprises unrelated to telecommunications. *See* 673 F.Supp. at 599. In addition, the court asserted that lifting the restriction would eliminate a significant burden on BOCs' business planning and free the court from unnecessary and detailed oversight of BOC decisions. *See id.*

The district judge left largely intact the decree's so-called "core" restrictions—those regarding interexchange services, manufacturing, and information services. The manufacturing and interexchange restrictions remained completely unchanged since the district court rejected arguments that circumstances had changed since the issuance of the decree so as to justify the BOCs' entrance into those markets under the standard imposed by section VIII(C). The district judge did grant partial relief to the BOCs on the information services provision but rejected the request of the DOJ and the BOCs to remove the restriction entirely for much the same reasons as he left the manufacturing and interexchange restrictions in place. The court asserted that information services are vulnerable even to slight manipulation and discrimination in access or transmission quality, thereby making it especially easy for the BOCs to use their bottleneck monopolies anti-competitively if they entered the market. *See* 673 F.Supp. at 566. Nevertheless, the information restriction was lifted insofar as it prevented the BOCs from providing transmission of information services generated by others. *See* 673 F.Supp. at 587-97. The district judge described the economic and social advantages of making information services more widely available and noted that the tele-

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non-telecommunications activities engaged in by a single BOC were limited to ten percent of that company's total net revenues. These conditions were designed to minimize the risk of cross-subsidization and to guarantee that the BOCs would not neglect their primary responsibility of providing local telephone service. *See* 673 F.Supp. at 598.

phone system was perhaps the only means of accomplishing that goal, because it uniquely offers providers a means "to reach large, dispersed audiences over reasonbly priced, interactive facilities." 673 F.Supp. at 564. So long as the BOCs do not compete with the companies that *generate* the information services, the district judge reasoned, they would have an incentive to afford the widest, fastest, and highest quality access and transmission to all information providers, thereby maximizing their own revenues. This determination was further explained and substantially reaffirmed by the district judge following a separate proceeding held to work out the details of the information services restriction. *See* 714 F.Supp. at 1. All of these rulings have been appealed.

II.

A. *Standard of Review*

We have repeatedly held that the construction of a consent decree (indeed of this particular consent decree) is subject to *de novo* appellate review. *See United States v. Western Elec. Co.*, 894 F.2d 1387, 1390 (D.C.Cir. 1990); *United States v. Western Elec. Co.*, 846 F.2d 1422, 1427 (D.C.Cir.), *cert. denied*, —— U.S. ——, 109 S.Ct. 306, 102 L.Ed.2d 325 (1988); *United States v. Western Elec. Co.*, 797 F.2d 1082, 1089 (D.C.Cir.1986), *cert. denied*, 480 U.S. 922, 107 S.Ct. 1384, 94 L.Ed.2d 698 (1987); *see also United States v. Armour & Co.*, 402 U.S. 673, 681-82, 91 S.Ct. 1752, 1757-58, 29 L.Ed.2d 256 (1971). "We read the Decree essentially as we would a contract. *See United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 [95 S.Ct. 926, 934-35, 43 L.Ed.2d 148] (1975); *United States v. Western Elec. Co.*, 797 F.2d 1082, 1089 (D.C.Cir.1986) ("*Western Elec. II*"), *cert. denied*, 480 U.S. 922 [107 S.Ct. 1384, 94 L.Ed.2d 698] (1987). Thus, while the meaning of the Decree's terms 'must be discerned within its four

corners,' *United States v. Armour & Co.*, 402 U.S. 673, 682 [91 S.Ct. 1752, 1757, 29 L.Ed.2d 256] (1971), our inquiry is guided by conventional 'aids to construction,' including 'the circumstances surrounding the formation of the consent order [and] any technical meaning words used may have had to the parties . . .' *ITT Continental Baking Co.*, 420 U.S. at 238 [95 S.Ct. at 935]." *United States v. Western Elec. Co.*, 894 F.2d at 1390.

Appellees nevertheless urge us to employ an "abuse of discretion" standard of review, arguing that what we are reviewing here is the district judge's decision not to modify the consent decree—subject to review only for abuse of discretion, *see System Fed'n No. 91 v. Wright*, 364 U.S. 642, 647-48, 81 S.Ct. 368, 371-72, 5 L.Ed.2d 349 (1961) —rather than his interpretation of the decree. We think that is an inaccurate description of this proceeding. At least insofar as the district court was faced with motions brought under section VIII(C), it was not asked by any appellant to modify the decree; it was asked to apply it. To the limited extent that that process might require the district judge to find facts (for instance, to determine whether the BOCs still possess monopoly power over local exchange services), we would review under a clearly erroneous standard. *Cf. City of Las Vegas v. Lujan*, 891 F.2d 927, 931 (D.C.Cir.1989). But the legal standard for lifting the line of business restrictions pursuant to a BOC motion is explicitly provided by section VIII(C) of the decree and therefore the district judge need not "balance [any] imponderables," *Wright*, 364 U.S. at 648, 81 S.Ct. at 371, in deciding whether to remove them as he might in a case seeking modification. Indeed, the district court enjoys no equitable discretion at all in applying section VIII(C); if the petitioning BOC makes the required showing, the district court "shall" remove the restriction. Therefore, aside from fact-finding, we owe no deference to the district court's decisions under section VIII(C). And to the extent that we review the district

court's conclusions about the scope of the applicability of section VIII(C) (as opposed to section VII) for modifications, that is clearly a pure question of law subject to plenary review.[9]

Further, we reject the suggestion—apparently embraced by other circuits, *see, e.g., Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir.1986)—that this particular district judge's interpretations should be afforded some "special" deference because he drafted the pivotal provision of the decree, section VIII(C), and because he has had enormous experience overseeing the case and the decree since its inception. In addition to our discomfort with the concept that the degree of deference we afford should depend even in part on the identity of a district judge hearing the case below, we also note that appellate courts do not normally defer to anyone else's non-contemporaneous interpretations of the Constitution, statutes, cases, or contracts—whether or not the interpreter was also the drafter of the language at issue. When we defer to agency interpretations of their own ambiguous statutes, *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), or of contracts, *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563 (D.C.Cir.), *cert. denied*, 484 U.S. 869, 108 S.Ct. 200, 98 L.Ed.2d 151 (1987), we do so on the assumption that Congress delegated to departments or agencies the reconciliation of agency policies implicated in that function—institutional concerns not present when we review district court opinions.[10]

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[9] We need not decide here whether "abuse of discretion" is the proper standard for reviewing the district court's decisions concerning modification under section VII—where the district judge is apparently called upon to apply a public interest standard. *But cf. Maryland v. United States*, 460 U.S. 1001, 1001-06, 103 S.Ct. 1240, 1241-44, 75 L.Ed.2d 472 (1983) (Rehnquist, J., dissenting).

[10] In interpreting the decree, we do, however, take careful account of the explanatory opinion issued by the district judge at the time

B. *Applicability of Section VIII(C)*

Except for some BOC petitions regarding information services, the BOCs and the DOJ brought, and the district court analyzed, all of the motions to lift the line of business restriction under the standard set out in section VIII (C) of the decree. It is unclear to us, however, that section VIII(C) applies at all to some of those motions. In the first place, section VIII(C) refers to "a showing by the *petitioning BOC*," and thus, on its face contemplates only petitions brought by BOCs. The DOJ's hardline position in favor of the restrictions in 1982 further indicates that when the parties agreed to the decree, none of them contemplated that the DOJ would seek to invoke section VIII(C). We do not see, therefore, how the DOJ can petition for removal of restrictions under section VIII(C).[11] That is not to suggest that if section VIII(C) is not available to the DOJ no avenue for requesting modification would be open to it. Section VII explicitly provides for modifications of the decree, and the district court would possess equitable power to modify the decree even if section VII were not included, *see United States v. Swift & Co.*, 286 U.S. 106, 114-15, 52 S.Ct. 460, 462-63, 76 L.Ed. 999 (1932).[12] Furthermore, as a

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the decree was entered, *see* 552 F.Supp. at 131, although we are, of course, not bound by it, *see United States v. Western Elec. Co.*, 846 F.2d at 1429.

[11] When pressed at oral argument about the applicability of section VIII(C) to DOJ motions, counsel for the Department stated, surprisingly, that the Government had "no position" on the matter, noting that the Court had "not asked [the Department] to argue" that issue.

[12] The Government *opposed* the modification sought in *Swift*, and therefore it is not at all clear to us that the stringent, so-called "unforeseen conditions" test of *Swift* would apply to motions brought by the *DOJ* under section VII. Since the DOJ is, as plaintiff, the "Prime Mover" of this case, it may well be that modifications it seeks should be evaluated under a standard somewhat more akin to the "public interest" test of the Tunney Act. Still, it is

party to the decree, the DOJ's position on any BOC petition would be considered by the district court in much the same way as is an intervenor's views—whether it supports or opposes the petition. Strictly speaking, however, only the BOCs can be petitioners under section VIII(C).

We also believe that section VIII(C) does not apply to proposed modifications that are agreed to by all the parties to the decree, such as the motions for removal of the restrictions on BOC entry into the information services field. Section VIII(C) speaks of a "*showing* by the *petitioning* BOC," thereby indicating that it applies only to contested motions for removal—and this reading comports with the intent of the parties as expressed to the district court in 1982. *See infra* Part III.C.1. As we explain more fully in Part III of this opinion, uncontested motions for modification—those involving the information services and non-telecommunications businesses restrictions—should be treated by the district judge under section VII of the decree, and should be approved so long as the modifications satisfy the "public interest" standard embodied in the Tunney Act. Thus, while both the district judge and the parties treated the removal of the line of business restrictions as though it were governed entirely by section VIII(C), that section was really the appropriate standard only for the BOC petitions for removal of the manufacturing and interexchange restrictions—the former opposed by AT & T and the latter by both AT & T and the DOJ.

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true that the line of business restrictions were part of what AT & T bargained for in the original decree, therefore suggesting that the modification requests that AT & T opposes should perhaps be viewed differently from those that all the parties agree to. We need not pass judgment on this issue here since the DOJ brought no motion under section VII.

C. *The VIII(C) Standard*

The proper construction and application of section VIII(C) is nonetheless critical in reviewing the district court's decision not to remove the manufacturing and interexchange restrictions. There is no dispute, at least not on appeal, that the BOCs still possess their bottleneck monopolies in local exchange services. Despite certain technological innovations, only a minute percentage of telephone users can bypass the local exchange carriers for any of their calls. *See* 673 F.Supp. at 536-40. The question under VIII(C), then, is whether any petitioning BOC has made a showing "that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." Given the enormous legal resources expended on the issue, it is hardly surprising that the parties hotly dispute the meaning of the quoted phrase and the proper scope of the district judge's inquiry in deciding whether the standard has been met. According to both the DOJ and the BOCs, the district court's analysis suffered from several flaws: (1) misconstruing the actual terms of section VIII(C) quoted above; (2) failing to accord deference to the recommendations and opinions of the DOJ and FCC; and (3) taking into account allegedly irrelevant factors while ignoring or discounting critical changes in the industry since the decree.

We begin with a close parsing of section VIII(C)'s terms. Section VIII(C) requires a BOC to show that there is no "*substantial* possibility that it could use its monopoly power to impede competition." According to the DOJ and the BOCs, the district court altered the decree by implicitly equating the phrase "substantial possibility" with a mere theoretical possibility. Since the BOCs concede that they could always theoretically use their local exchange monopolies to impede competition, they claim that this putative misreading was tantamount

to a ruling that retention of the local exchange monopolies precludes relief from the interexchange and manufacturing restrictions under section VIII(C). They base this argument on the district court's statements to the effect that the local monopolies "continue to provide the same basis for anticompetitive activity as they did prior to the Bell System breakup." 673 F.Supp. at 543. While we do not read the district court's opinion, as appellants do, to have amended the decree, *see, e.g.*, 673 F.Supp. at 536 n. 42 (explicitly rejecting the contention that "the restrictions are justified by the mere fact that a monopoly exists in an area"), the importance of the word "substantial" should not be minimized. The ultimate burden under section VIII(C) remains on the petitioning BOC,[13] but the requirement that the possibility of using its monopoly power to impede competition be "substantial" relieves the BOC of the essentially impossible task of proving that there is absolutely no way for it to use its monopoly power to impede competition. For example, the district judge's speculation that the BOCs could impede competition by way of illegal (and perhaps criminal) collusion to divide markets among them according to territory, *see* 673 F.Supp. at 558, would, in the absence of supporting evidence, seem to qualify only as a theoretical possibility.

The parties also differ markedly concerning what precisely is meant by section VIII(C)'s ambiguous phrase

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[13] We do not agree with the district judge, however, that the BOCs' burden is "particularly heavy" because of the litigants' and the public's interest in the finality of judgments or because would-be competitors of the BOCs invested "billions of dollars" in reliance on the line of business restrictions. *See* 673 F.Supp. at 533 n. 25. Any enterprise that read the decree and the district court's 1982 opinion could not reasonably have relied on the perpetual enforcement of the line of business restrictions in light of the inclusion of section VIII(C) and the explicit pledge to review the continuing need for the restrictions every three years. And any interest that any party conceivably has in the "finality" of this judgment is necessarily tempered by the same factors.

"*impede competition* in the market it seeks to enter." According to the DOJ, a BOC cannot impede competition in a given market unless it has market power—the ability to restrict output and/or raise prices. AT & T argues that the district court's 1982 opinion equated impeding competiion with "leveraging" monopoly power, something that AT & T claims a BOC can do so long as its local exchange monopoly is also an "essential facility" for the market it seeks to enter. Whatever it means to "leverage" one's monopoly power, the DOJ is surely correct that no damage to competition—through "leverage" or otherwise—can occur unless the BOCs can exercise market power. *Cf. General Leaseways, Inc. v. National Truck Leasing Ass'n,* 744 F.2d 588, 596 (7th Cir.1984). To be sure, it may be difficult to decide whether the BOCs would have such power if they were allowed to enter a market. Moreover, it may be necessary to refine the analysis to deal with markets in which self-dealing bias is a risk, such as the production of central office switches and transmission equipment. In those markets, a BOC might be able effectively to raise prices (disguised as costs in the local exchange market) or restrict output—thereby impeding competition—in the segment it controls or forecloses. *See infra* Part III.B. The district court, however, was apparently concerned with the possibility that BOC entry into new markets would disadvantage or destroy small and innovative firms in those markets. *See, e.g.,* 673 F.Supp. at 561 (castigating the DOJ for its indifference to the possible destruction of "many high-quality firms producing high-quality goods that have emerged since divestiture"). New entry or increased competition in any market typically hurts and sometimes even destroys existing competitors. A court's solicitude for those firms—ostensibly in an effort to foster competition—may well come at the expense of competition. *Cf. Cargill, Inc. v. Monfort,* 479 U.S. 104, 115, 107 S.Ct. 484, 492, 93 L.Ed.2d 427 (1986). Accordingly, unless the entering BOC will have the ability to

raise prices or restrict output in the market it seeks to enter, there can be no substantial possibility that it could use its monopoly power to "impede competition."

And while there may be some complexities in defining precise boundaries of the relevant market, one thing that is clear from section VIII(C) is that it is the "market [the BOC] seeks to enter" that matters, and *not* the local exchange market. For the most part, then, the district court should decide motions under section VIII(C) without regard to the effect BOC entry into new markets will have on local service ratepayers. Concern for the ratepayers' welfare is primarily the responsibility of the FCC and state regulators, not the district court. Appellees make much of DOJ's prior position before the district court when the decree was entered when the Department urged the court to consider the interests of ratepayers in its evaluation and implementation of the decree. The DOJ concedes the shift, and the only explanation we are given is its statements in two footnotes of its brief that it now believes, contrary to its stance in 1982, that line of business restrictions should not be used—indeed, cannot be used under section VIII(C)—to protect ratepayers of local exchange services rather than solely to protect competition in unregulated markets. While this may have been the DOJ's contention at the time, we see no clear evidence that ratepayer protection was part of the "contemporaneous understandings of [the decree's] purposes," 846 F.2d at 1427. And, in any event, we believe the text of the decree generally forecloses the goal of ratepayer protection by the use of the words "the market [the BOC] seeks to enter."

In that regard, to the extent that the district court's consideration of cross-subsidization focused on the danger that the BOCs would overcharge local ratepayers, it was misconceived. *See, e.g.*, 673 F.Supp. at 557, 572. Cross-subsidization is relevant under VIII(C) insofar as it may be used to price below cost in the competitive market,

and thereby unfairly to acquire power and impede competition in that market. Still, the impact on the local exchange market of allowing BOC entry into a new market might well be relevant under section VIII(C) if the BOC is likely to be its own primary customer in the entered market, as with production of central office switches and transmission equipment. In that case, cross-subsidization or cost misallocation that allowed a BOC to pass on its (inflated) equipment costs to the local ratepayers would likely be the primary manifestation of market power and might constitute an impeding of competition *in the entered market. Cf.* 3 P. AREEDA & D. TURNER, ANTITRUST LAW, ¶ 726 (1978).

Appellants also fault the district court for failing to give deference to the views of the FCC and the Justice Department with respect to the BOC petitions under section VIII(C). The Justice Department's interpretation of the law is not normally given deference in a civil or criminal case; in federal courts, departments' and agencies' legal views are deferred to only when they make a determination (either quasi-legislative or quasi-judicial) that has independent legal significance—as opposed to when they act in a prosecutorial role. *See Michigan Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285 (D.C.Cir.), *aff'd by an equally divided court*, —— U.S. ——, 110 S.Ct. 398, 107 L.Ed.2d 277 (1989) Still it must not be forgotten that the Justice Department has the "principal responsibility for enforcing the Sherman Act." *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 14, 99 S.Ct. 1551, 1559, 60 L.Ed.2d 1 (1979). Therefore, although we see no doctrinal basis for the district court to defer to the DOJ's interpretation of the decree or its views about antitrust law, it is to be expected that the district court would seriously consider the Department's economic analysis and predictions of market behavior. Indeed, it would seem that that is precisely why the district judge required the Department to

report to the court every three years concerning the continuing need for the restrictions imposed by the decree. *See* 552 F.Supp. at 195.

Economic analysis and market predictions are not an exact science. Antitrust scholars and courts have changed their views somewhat over the last fifty years concerning the interrelationship of the antitrust laws and market behavior. *Compare, e.g., United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967) *with Continental T.V., Inc v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977) (overruling *Schwinn* after determining that its *per se* rule against vertical nonprice restraints was not economically sound). *Also compare* Sullivan, *Economics and More Humanistic Disciplines: What are the Sources of Wisdom for Antitrust?*, 125 U.PA.L.REV. 1214 (1977) (arguing that economic efficiency is not the sole goal of the antitrust laws) *with* 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 103-113 (1978) *and* R. BORK, THE ANTITRUST PARADOX 50-89 (1978) (agreeing that courts should treat antitrust laws as designed solely to advance consumer welfare and efficiency). Consequently, we recognize that the DOJ may change its views—to incorporate different policy concerns—over time. That is not to say that we do not have any sympathy for the district court's attitude toward the DOJ's position changes in this Triennial Review. As we noted above, the DOJ in 1982 wanted the line of business restrictions to remain in place unless and until the BOCs lost their local exchange monopolies. With little warning or explanation, the DOJ completely altered its stance and is now generally hostile toward the restrictions. In the absence of a complete explanation of how and why the DOJ's position had changed, the district judge was understandably uneasy about relying on the DOJ in this first Triennial Review since to do so would be to undo much of the decree after only three years' time.

The FCC's claim to deference is perhaps even more puzzling to analyze. The FCC argues that the district court acted improperly when it evaluated the effectiveness of the FCC's regulatory scheme since that is solely the function of a court of appeals pursuant to direct review as provided by the Communications Act. The problem with this argument is that a court of appeals reviews FCC regulations only if they are challenged and only to ensure that they are not arbitrary and capricious. The district court below, however, was *obliged* to determine ultimately whether the FCC's regulations would effectively prevent the BOCs from using their monopoly power to impede competition in the markets they sought to enter. *Cf.* 846 F.2d at 1433. The very premise of this case was that the FCC could not effectively control AT & T. We think it would therefore have been an abdication of judicial responsibility for the district court to assume that the FCC's regulations would be effective merely because they had not been found to be arbitrary and capricious.

On the other hand, we recognize the institutional amomaly presented by a district judge placed in the position of evaluating the effectiveness of a federal agency's regulatory program. The DOJ, which brought this action based on its view that the FCC was incapable of preventing AT & T's abuse of monopoly power, would appear to be in a better position, both institutionally and practically, to evaluate the FCC's regulatory effectiveness. And, therefore, we would expect the district court to consider the Department's comparative advantage in performing that task. However, two of the principal FCC regulations that bear on this appeal, the *Joint Cost* and the *Computer III* rules, had not been finally implemented at the time this case was submitted to the district court. Thus the DOJ's assessments of those regulations that are in the record of this appeal are necessarily speculative. *See e.g., infra* notes 16, 17, 21. Rather than hazard our own,

necessarily under-informed, appraisal of how these rules have performed in the three years since this case was presented to the district court, we think it is more prudent to await the DOJ's assessment in subsequent Triennial Reviews.[14]

Appellants further argue that the district court erred in its application of section VIII(C) by considering factors it should have ignored while ignoring some that it should have considered. Most importantly, appellants take issue with the minimal significance that the district court placed on the break-up of AT & T's local exchange monopoly into seven separate BOCs in deciding whether to lift the line of business restrictions. The decree was premised on the notion that the BOCs would have both the incentive and the ability to use their local exchange monopoly to impede competition in these markets, therefore necessitating the line of business restrictions. *See* 552 F.Supp. at 187. Under section VIII(C), therefore, the BOCs must establish that something is different now from the time when the decree was entered so that they can no longer use their monopoly power to impede competition. Obviously, if all conditions and assumptions remain the same now as when the decree was entered, no relief can be due under section VIII(C).

While we reject the BOCs overly loose reading of the restrictions under section VIII(C), we also reject the appellees' overly rigid interpretation of those restrictions. The appellees appear to insist that the standard under section VIII(C) requires a finding of some *unforeseen* changed circumstances as an ingredient of the petitioners' showing necessary to justify removal of a line-of-business restriction. This construction finds no support in the

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[14] Assuming after remand the BOCs are permitted entry into the information services market, we would also expect the DOJ's reports concerning BOC behavior in that market as well as the effectiveness of applicable FCC regulation to be critical in subsequent Triennial Reviews.

language of the decree. Rather, the decree provides that a petitioning BOC is entitled to relief under section VIII (C) so long as it can prove that its ability to impede competition is no longer present. It would make no difference whether the circumstances leading to that conclusion were entirely foreseen or even if they could not be discretely identified. Indeed, even if the economic assumptions or market predictions which governed the decree turned out to be in part wrong, the BOCs might thereby be entitled to relief under section VIII(C).

To be sure, as the district court noted, the mere existence of seven BOCs in place of the prior unified Bell System is not by itself a significant factor. Not only was it the very product of the decree, the seven continue to exercise monopoly power in the local exchange market. However, the other conditions in the various telecommunications markets wrought by divestiture and the behavior of the BOCs since divestiture are appropriately considered under section VIII(C), even if they were foreseen by the parties or incorporated into the fabric of the decree. These are not limited to obvious changes such as new competitors that did not exist or were not stable at the time of the decree. The court also may properly consider the manner in which the seven BOCs behave competitively against each other, AT & T, and other firms, as well as the way in which the various markets have evolved since the decree. It was feared, for instance, at the time the decree was entered that the BOCs would favor one another and AT & T over unrelated firms, a concern that now appears unfounded. Also appropriately considered in the section VIII(C) calculus is the asserted existence of "benchmarks" for comparing BOC performance. According to appellants and the FCC, these benchmarks would make it far easier to regulate the BOCs than the old Bell System if the BOCs were permitted to enter other markets. That the "possibility of the existence of benchmarks was necessarily included in the decree assumption

which imposed the restrictions." 673 F.Supp. at 547, makes them no less significant under section VIII(C). Indeed, the greater ease with which the FCC can regulate the BOCs merely because they have a monopoly in only one geographic portion of one of the markets controlled by AT & T prior to the decree—although clearly contemplated (and therefore foreseen) at the time of the decree, *see* 552 F.Supp. at 187—is properly considered under section VIII(C). Of course, the district court still legitimately imposes on the petitioning BOCs the burden of making the requisite showing.

Finally, we consider appellants' claim that the district court strayed beyond the competitive analysis mandated by section VIII(C) when it considered the impact of removing the restrictions on various public policies, including the welfare of local ratepayers, innovation in the manufacturing market, the goal of universal telephone service, first amendment values, and the United States' position in international trade. The district court explained its discussion of these factors by noting that "the same standards may be applied in proceedings addressing continued viability of the restrictions as were used in determining whether the restrictions were to be imposed in the first place." 673 F.Supp. at 583. We disagree. When the district court entered the decree in 1982, it decided—as it was required to do under the Tunney Act—whether the decree was in the public interest. Whatever the substance of the "public interest" standard, it is surely more far-ranging than the section VIII(C) standard. When a BOC petitions under section VIII(C) for the removal of a line of business restriction, section VIII(C) itself defines the limits of the district judge's inquiry. If a BOC makes the showing called for by section VIII(C), the district judge may not, for example, deny the motion because of the possible impact on the United States' bal-

ance of trade, or for any other reason not related to the antitrust laws.[15]

III.

We turn next to the district judge's rulings on the BOC motions to remove the interexchange and manufacturing restrictions. As we noted above, the BOC motions to remove these two restrictions were the only motions properly analyzed under section VIII(C) of the decree. We therefore need not separately consider the DOJ's motions, which were brought explicitly pursuant to section VIII (C), to the extent that those motions are different in substance from the BOC motions.

Despite our disagreements with the district judge concerning the matters described above, we agree that the BOCs did not satisfy their burden in this Triennial Review of showing that there was no substantial possibility that they could use their monopoly power to impede competition in these markets. On appeal, the DOJ and the BOCs focus their criticism on the district court's analysis and the standard it applied. As such, they ask us to remand for reconsideration under the "legally correct VIII(C) standard." Since we conclude that the district court reached the correct results on the motions properly considered under VIII(C), there obviously is no reason to remand those motions to the district court.

A. *Interexchange Services*

The BOCs, supported by the FCC but not the DOJ, argue that the interexchange restriction should be removed in spite of the conceded persistence of their local

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[15] The district judge explicitly stated that his considerations of some of the public policies mentioned above "d[id] not have an actual impact on the Court's decisions." 673 F.Supp. at 580. While that disclaimer makes it somewhat unusual that he would include the sections of his opinion expressly dealing with those public policies, we take the district judge at his word.

exchange monopoly—upon which interexchange carriers rely for access to ultimate consumers—because changed circumstances since the decree would prevent them from impeding competition if they were permitted to enter the market. The DOJ opposes the BOCs' petition.

The district court noted that the interexchange market is currently competitive. Even though AT & T still retains a lion's share of the market, there are hundreds of long-distance carriers in the United States, eight of them serving twenty-five or more states. *See* 673 F.Supp. at 550. This apparently undisputed fact leads the district court to the curious observation that "the entry of the [BOCs] into that market is not necessary to give it vitality." *Id.* Section VIII(C) does not put the BOCs in the "Catch-22" that the district judge seems to imply by that statement—that the restriction will not be lifted if the market to be entered is not competitive because the BOC will grab and wield market power nor will it be lifted if the market to be entered is highly competitive because the BOCs' presence is not "necessary." If the market to be entered is sluggish or concentrated, that might be an argument in favor of allowing BOC entry, although it might also make it easier for a BOC to acquire market power. But if the BOC wants to enter a *competitive* market, that is a powerful reason to grant the section VIII(C) petition since there is less of a danger that the BOC will be able to seize and wield market power.

Nevertheless, we agree with the district court's conclusion regarding the changes in the interexchange market. The crux of the BOCs' argument is that equal access for all interexchange carriers has been achieved and cross-subsidization eliminated, thus closing off the primary way for the BOCs to acquire market power anticompetitively. This has allegedly come about primarily through FCC regulation that was made more effective by the fragmenta-

tion of the Bell System's local exchange monopoly into seven BOCs. As we indicated above, even though the mere existence of the seven BOCs is not a significant consideration under section VIII(C), the break-up is critically important insofar as the FCC has been able to adopt its regulations to the more manageable task of overseeing seven regional monopolies instead of one national, vertically-integrated one. *See* 552 F.Supp. at 187. On this point, we think the DOJ's assessment of the FCC's regulations is entitled to significant weight. According to the DOJ, those regulations, combined with the BOCs' own equal access plans have "eliminated most of the anti-competitive advantages of AT & T formerly enjoyed." At the time this case was before the district court, however, the DOJ asserted that "the FCC's equal access rules are based on the assumption that the BOCs will not provide interexchange services. Thus the FCC has not yet developed rules that would apply to nondiscrimination and cost separation principles of the *Computer III* [16] and *Joint Cost* [17] proceedings to BOC provision of interexchange services." And until those regulations are adjusted to take account of BOC entry into the interexchange market—entry which would, of course, provide an incentive to deny equal access and to cross-subsidize if possible—the DOJ represents that equal access and proper cost allocation cannot be assured.

The DOJ also points out that violations of the equal access policy are extremely difficult to detect and remedy, *see* 846 F.2d at 1424-25, thereby underscoring the danger of allowing entry before the FCC's regulations are designed

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[16] 104 F.C.C.2d 958 (1986), *on reconsideration*, 2 F.C.C.Rcd 3035 (1987), 3 F.C.C.Rcd 1135 (1988), *appeal docketed sub nom. California v. FCC*, No. 87-7320 (9th Cir. May 28, 1987).

[17] 2 F.C.C.Rcd 1298, *on reconsideration*, 2 F.C.C.Rcd 6283 (1987), *on further reconsideration*, 3 F.C.C.Rcd 6701 (1988), *petition for review denied sub nom. Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C.Cir.1990).

to deal with the problem. Finally, the DOJ warns that the BOCs will have an easier time acquiring market power in the interexchange market than in other markets because many of the firms that began providing interexchange services after the decree have not yet become stable in the highly capital-intensive field. Since the BOCs raise no serious opposition on appeal to any of these points made by the DOJ and since we have no other reason to doubt the DOJ's assessments, we affirm the district judge's conclusion that the BOCs failed to show that there was no substantial possibility that they could use their monopoly power to impede competition in the interexchange market.[18]

B. *Manufacturing*

The "manufacturing restriction," imposed by section II(D)(2) of the decree and amended by section VIII(A) is really more properly conceived of as two restrictions. First, it forbids the BOCs from manufacturing (but permits them to provide) customer premises equipment ("CPE"), which "includes equipment employed on the premises of anyone other than a carrier that is utilized to originate, route, or terminate telecommunications." 673 F.Supp. at 552 n. 116. Second, it prohibits the BOCs from manufacturing or providing telecommunications equipment, that is, equipment other than CPE used by a carrier to provide telecommunications services. *See id.* The BOCs petition, with DOJ support, for the complete

[18] The BOCs pressed the argument below that the interexchange restriction should be removed because the Justice Department agreed to, and the district court accepted, a consent decree in an antitrust action against GTE that did not include line of business restrictions. *See United States v. GTE Corp.*, 603 F.Supp. 730 (D.D.C. 1984). This claim was not raised on appeal and so we do not discuss it. We also have no occasion to discuss the suggestion made by the DOJ below, but dropped on appeal, that the restriction should be lifted with respect to cellular radio, paging, and other mobile interexchange services.

removal of the manufacturing restriction, and the district court left the restriction intact.

1. *Telecommunications Equipment*

The BOCs and the DOJ argue that market changes since the decree and regulatory adaptations to the post-divestiture market warrant removal of the telecommunications equipment restriction. The Justice Department further divides the telecommunications equipment market into separate markets for central office switches and for transmission equipment (primarily metal cable). The DOJ makes the significant concession that any BOC that chooses to manufacture central office switches, either unilaterally or through a joint venture, will buy all (or nearly all) of its requirements from the affiliated producer—thereby foreclosing a certain portion of the market, whether or not there are economies to be gained from such integration.[19] Nevertheless, the BOCs will not impede competition (although competitors will surely be hurt) in the switch market, it is argued, because large economies of scale would prevent any BOC from remaining in the market solely to sell to itself. Even the largest BOC buyer of switches in 1985 purchased only 1.4 million lines of new switching capacity, about 17 percent of the U.S. market. Only two other BOCs purchased over one million switches and two BOCs bought less than 500,000. *Huber Report* at 14.8. The *Huber Report* estimates that switch producers must sell upward of 1.5 million switches per year to survive and many more to be profitable. *Huber Report* at 14.15-14.16. Of the three major U.S. switch producers, two (AT & T and Northern

[19] This latter admission moots any suggestion that the district court should have balanced the asserted economies of vertical integration against the anticompetitive danger of BOC entry into the market. We express no opinion as to whether such a balance would be the proper subject of litigation in future Triennial Reviews. *Cf.* 673 F.Supp. at 560.

Telecom) sold over 4.5 million switches in the U.S. in 1985, and perhaps twice that many worldwide. The third (GTE) sold only about 1.5 million switches in 1985 and is losing money in its equipment businesses. *Huber Report*, 14.8, 14.14-14.15. Assuming that there are not joint ventures among BOCs (which the DOJ admits would alter its assessment), the DOJ argues that only a few BOCs would enter the switch market and those that did could not afford to produce idiosyncratic (or overpriced) switches since they would have to attract at least some significant number of nonaffiliated buyers who, of course, can choose among many producers.

The DOJ further concedes, however, that the image they convey of the efficient BOC producer of switches is somewhat clouded by the danger of anticompetitive interconnection discrimination and of cross-subsidization. The risk of interconnection discrimination, by which a BOC would design its switches in a way that would favor the BOC's self-produced equipment over rival manufacturers, has allegedly been "substantially decreased" by more effective regulatory control—especially the availability of benchmark comparisons among the BOCs.[20] Cross-subsidization is a "plausible concern" in the switch market, the DOJ tells us, because of the need to attract a large market share, the extensive shared costs with local exchange services (especially research and development) ("R & D"), and traditional difficulty encountered by regulators in discovering cost misallocations. Indeed, ac-

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[20] The DOJ also noted that the so-called "Open Architecture" or ONA requirements, an integral part of the FCC's *Computer III* rules, might provide another obstacle to a BOC's ability to discriminate. When the case was presented to the district court, however, the DOJ represented that "it is unclear just what the impact of ONA on the potential for discrimination will be and how those effects will vary from market to market." For that reason, we do not understand how a court could be expected to rely at all in this Triennial Review on the asserted efficacy of the FCC's *Computer III* rules.

cording to the DOJ, a BOC "might not have to produce efficiently to attract its own operating companies as buyers if regulators did not prevent recovery of excessive switch costs." And while the risk of cross-subsidization cannot be eliminated completely, FCC regulation—especially the availability of benchmarks to enforce effective accounting rules—would "significantly mitigate" it.[21] Finally, the DOJ maintains that a small amount of cross-subsidization would not impede competition in the entered market; rather its primary effect would be to raise the price of local exchange service, a problem that the DOJ suggests is to be handled by regulators and is irrelevant to this proceeding.

The DOJ's assessment of the transmission equipment market is substantially similar to that for central office switches. In the transmission equipment market, as was true of central office switches, any BOC would purchase all or most of its own equipment from its own manufacturing affiliate; not all BOCs would manufacture every type of transmission equipment. There is some danger of discrimination and of cross-subsidization, but, due in large part to the availability of benchmark comparisons, that risk is substantially less than it was prior to divesti-

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[21] The DOJ also pointed to the FCC's *Joint Cost* proceeding which, it argues, will give the BOCs the incentive to develop accounting rules that are acceptable to the FCC in order to escape from the separate subsidiary reqirements for BOC provision of enhanced (information) services and CPE. Whatever merit there might be in this argument—and we note that the district judge thought there was very little—we need not even consider it in this Triennial Review since the *Joint Cost* rules had not been implemented at the time this case was brought. *See* 673 F.Supp. at 572. Furthermore, we note with some discomfort that at least some of the BOCs were petitioning this court to strike down as arbitrary and capricious one of the central aspects of the *Joint Cost* rules designed to deal with the cross-subsidization problem while simultaneously pointing to the *Joint Cost* rules in this appeal as effectively ending the cross-subsidization danger. *See Southwestern Bell Corp. v. FCC*, 896 F.2d 1378 (D.C.Cir.1990).

ture. Among the salient differences is that the market has supported competition even though the BOCs have already been allowed to provide transmission equipment in the form of CPE, and therefore already possesses an incentive to discriminate in interconnection. In addition, cross-subsidization is allegedly less probable than in the switch market because R & D costs, normally the prime source of cross-subsidization, are so low.[22]

Even if we did accept the DOJ's market forecasts and regulatory assessments wholesale, it would not suffice to compel removal of the telecommunications equipment restriction under the section VIII(C) standard. As we discussed above in Part II(C), the possibility of self-dealing bias in the telecommunications equipment market poses dangers to competition that do not exist in the other markets the BOCs seek to enter. The DOJ's submissions provide little solace against those dangers. As we noted above, the DOJ "assumes that any BOC that manufacturers equipment would purchase substantially all of its requirement from its affiliate," presumably regardless of price or quality. While the BOCs and the DOJ contend that not all BOCs will produce each type of equipment and therefore dispute the district judge's conclusion that the BOCs would foreclose 70% of the telecommunications equipment market, there sems to be no dispute that some substantial portion (5-15%) of the equipment market will be foreclosed.

Such foreclosure, if combined with cross-subsidization, would appear to allow the BOCs, in effect, to raise prices (and therefore exercise a form of market power) in the foreclosed sectors of the equipment market by disguising inflated equipment prices as costs in the local exchange market. *See supra* Part II.C. To be sure, the DOJ ad-

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[22] Conversely, R & D costs are quite high in the fiber-optics sector of the transmission equipment market. Still, the DOJ submits that cross-subsidization is not a primary concern since the BOCs' competitors in that sector could respond in kind to cross-subsidization without suffering any competitive disadvantage.

vised the district court that FCC regulation would substantially reduce the risk of cross-subsidization. In its own reports on the two principal telecommunications equipment submarkets, the DOJ nevertheless concedes that the BOCs would possess both the incentive *and the ability* to cross-subsidize, at least somewhat. The DOJ and the BOCs nowhere explain, however, why any significant amount of cross-subsidization that, in practical terms, enables the BOCs to charge higher prices for the equipment it produces would not be akin to an exercise of market power that would impede competition in the telecommunications equipment market. At least in this first Triennial Review, it is not enough for the BOCs (independently or through the DOJ) to show that a significant number of stable competitors will be able to survive BOC entry. We think that the BOCs cannot meet their burden under section VIII(C) without also explaining why foreclosure combined with cross-subsidization does not *itself* pose a "substantial possibility that the BOC could use its monopoly power" in the telecommunications equipment market.

2. *Customer Premises Equipment*

The DOJ subdivides the CPE market into the private branch exchange ("PBX") market and the terminal equipment market. While it analyzed those sub-markets separately, the DOJ believes—for reasons similar to those offered for the telecommunications equipment market—that BOC entry into both would not threaten competition. The PBX market is described as "moderately concentrated"—with three major and many minor producers—but nevertheless competitive. The DOJ points out that the BOCs have been permitted to *provide* PBXs (as well as all other forms of CPE) since the decree, and that they therefore have always had the incentive to provide discriminatory interconnection. If allowed to produce PBXs, that discrimination could manifest itself through BOC manipulation of its local network or through dis-

criminatory dissemination of network information. We are assured, however, that the BOCs' *ability* to discriminate will be blocked, as it has been until now, by numerous obstacles, especially FCC regulation.[23] Similarly, any danger of cross-subsidization in the PBX market is dismissed by the DOJ as negligible.

The DOJ's argument with respect to the terminal equipment market is based again on the premise that no BOC could successfully discriminate against its rivals, either by way of interconnection or by failing to provide critical network information. Their ability to discriminate is asserted to be undercut somewhat by the advent of PBX use, as well as cellular and paging systems for which the BOCs do not even provide the interconnection with the terminal equipment and which all contribute to the prevalent use of standards in interconnection. Residual risk of discrimination, as well as the risk of cross-subsidization, are adequately prevented by FCC regulation.

While we certainly have some resrvations concerning the DOJ's assessment of the CPE market,[24] we are inclined to think that the question is much closer than it was for telecommunications equipment. Since the BOCs purchase only a minute percentage of the nation's CPE output, there is no risk of the combined cross-subsidization and foreclosure that is so crucial to our decision on telecommunications equipment. Indeed, on appeal, the BOCs and the DOJ complain primarily that when the district judge discussed foreclosure, he did not differentiate between CPE and the various types of telecommuni-

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[23] Among the regulations relied upon, however, were the new *Computer III* and *Joint Cost* rules which were not fully implemented at the time this case was submitted to the district court.

[24] For instance, we question the DOJ's reliance on not-yet-final regulations as well as its apparent equation of FCC success in regulating CPE *provision* by the BOCs with its ability to regulate their CPE manufacturing. It would seem that manufacturing offers far greater opportunities for discrimination in interconnection.

cations equipment that the BOCs do purchase themselves in great quantity. While we agree that different competitive concerns should motivate decisions regarding CPE than those regarding telecommunications equipment, we do not perceive that as a reason to upset the district court's decision as it applies to CPE manufacturing. The burden under section VIII(C) is not is not on the district judge; it is on the petitioning BOCs to show that they can enter certain markets without raising a substantial possibility that they could use their monopoly power to impede competition in those markets. In this Triennial Review, the BOCs petitioned for *complete* removal of the manufacturing restriction, and the DOJ explicitly urged the district judge *not* to distinguish between the two types of equipment in making his decision, because line-drawing between them is so different. Given the risks to competition we identified in the telecommunications equipment market, the district court understandably did not allow the entire manufacturing destriction to be removed in this first Triennial Review, and the motions were properly denied.

C. *Information Services*

The BOCs and the DOJ also appeal from the district court's decision not to lift the restriction on "information services" under section II(D)(1), as that restriction is applied to the *generation* of information.[25] The district court found that there had "been no significant, relevant change in" market conditions justifying removal of this restraint under section VIII(C). 673 F.Supp. at 564.

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[25] Under the Decree,

> "Information service" means the offering of a capability for generating, acquiring, storing transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include any use of any such capability for the management, control, or operation of a telecommunications service.

Decree § IV(J), *reprinted in* 552 F.Supp. at 229.

Noting that neither the DOJ nor AT & T opposed lifting the information services ban, the BOCs contend that the district court should have reviewed this question under a more flexible "public interest" standard pursuant to section VII. *See supra* note 6. We agree, and hold that the district court erred in applying section VIII(C) to the uncontested motion to remove the line-of-business restriction on information services. And because we are unable to say that the district court would have reached the same result had it applied the proper legal standard, we are constrained to remand the case for further consideration of the BOCs' motion to remove the information services ban in its entirety.

1. *The Applicability of Section VII to Uncontested Motions to Modify a Line-of-Business Restriction Under the Decree*

It is well established that a less demanding standard of review applies to an uncontested motion to modify a consent decree than applies to a contested one. *See generally* Note, *Modifications of Antitrust Consent Decrees: Over a Double Barrel*, 84 MICH.L.REV. 134, 135 (1985). As we have explained, unless the parties have expressly agreed otherwise, an antitrust defendant can prevail on a contested motion to reduce or eliminate its obligations only if it can make "a clear showing of grievous wrong evoked by new and unforeseen conditions." *United States v. Swift & Co.*, 286 U.S. 106, 119, 52 S.Ct. 460, 464, 76 L.Ed. 999 (1932). But when all parties to a decree assent to a particular modification, the relevant inquiry for the court is whether the resulting array of rights and liabilities comports with the "public interest." *See, e.g., United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101, 104 S.Ct. 1596, 80 L.Ed.2d 127 (1984); *United States v. National Finance Adjusters, Inc.*, 1985-2 Trade Cas. (CCH) ¶ 66,856, at 64,248 (E.D.Mich.1985).

Through section VIII(C), the parties expressly altered this "common law" approach to decree modification. The question is *how much* they altered it. According to the BOCs, Section VIII(C) was intended merely to supplant *Swift*'s "grievous wrong" standard for *contested* modifications of the decree's line-of-business restrictions; *uncontested* motions to lift these restrictions, the BOCs argue, remain subject to the ordinary public interest standard as incorporated in section VII's general provision for modification of the decree.[26] Because neither AT & T nor the DOJ opposed the BOC's motion to remove section II(D)(1)'s information service restriction,[27] the BOCs conclude that the district court should have reviewed their motion under a public interest test rather than under section VIII(C)'s "no-substantial-possibility" test. The appellees reply that section VIII(C) furnishes the exclusive mechanism for modifying the decree's line-of-business restrictions.

Whether section VII or section VIII(C) governs an uncontested motion to modify section II(D) is not a mere academic question. By focusing on whether a particular uncontested modification is in the public interest, section VII allows the district court to approve an uncontested modification even without a showing of a "change" of any kind so long as the resulting array of rights and obli-

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[26] The DOJ, in contrast, premises its challenge to the district court's information-services ruling solely on the ground that the court misapplied *section VIII(C)*.

[27] Although the appellees suggest that AT & T did not *consent* to removal of the Decree's information-services restriction, it is clear from the record that AT & T did not *object* to such a modification of the Decree. *See* Joint Appendix 2695-96; *see also id.* 1402. The district court did not suggest otherwise. *See* 673 F.Supp. 534 & n. 33 (characterizing AT & T's position as "suggest[ions]" as to alternative "routes with respect to the information services restriction"). For purposes of identifying the proper standard of review, the critical point is that neither AT & T nor the DOJ *opposed* the BOCs' motion.

gations is " 'within the reaches of the public interest' " today. *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.) (quoting *United States v. Gillette Co.*, 406 F.Supp. 713, 716 (D.Mass. 1975)), *cert. denied*, 454 U.S. 1083, 102 S.Ct. 638, 70 L.Ed.2d 617 (1981).

To determine whether the parties intended section VII or section VIII(C) to apply to uncontested motions to modify the decree's line-of-business restrictions, we must look first to the text of the decree, and then, if the question remains subject to doubt, to " 'contemporaneous statements of [the decree's] objectives.' " *United States v. Western Elec. Co.*, 894 F.2d 1387, 1390-91 (D.C.Cir. 1990) (quoting *United States v. Western Elec. Co.*, 846 F.2d 1422, 1427 (D.C.Cir.), *cert. denied*, —— U.S. ——, 109 S.Ct. 306, 102 L.Ed.2d 325 (1988)). This inquiry convinces us that unconftested motions to modify line-of-business restrictions should be resolved pursuant to a public interest standard under section VII.

Contrary to the contentions of the appellees, the applicability of section VIII(C) is not dictated by the plain meaning of its terms. Section VIII(C) does not purport to be the *exclusive* standard for reviewing motions to modify restrictions imposed by section II(D). Indeed, as we have noted above, insofar as section VIII(C) makes removal of a restriction contingent "upon a *showing* by the *petitioning* BOC," 552 F.Supp. at 231 (emphasis added), this provision appears to contemplate adversarial testing of the relevant issues. At best, section VIII(C) must be deemed to be silent on the question of what standard applies to uncontested motions to remove the decree's line-of-business restrictions.

The circumstances surrounding the formation of the decree, however, leave little question that the parties expected uncontested motions to be governed by common law principles pursuant to section VII. When the parties initially submitted the decree to the district court, the only provision for modification was section VII. In ex-

plaining their understanding of that section, both parties stated that "[i]n the event that the parties agree to an amendment of the modification to remove [a line-of-business] restriction, the standard for such removal would be whether it is in the public interest." Brief of the United States in Response to the Court's Memorandum of May 25, 1982 at 32, *reprinted in* J.A. 882; *see* AT & T Brief in Response ot the Court's Memorandum of May 25, 1982 at 17-18, *reprinted in* J.A. 849-50 (stating same view).

The addition of section VIII(C) cannot be viewed as altering this understanding. The district court conditioned approval of the decree on adoption of section VIII(C) in order to alter the parties' stated intention that *contested* motions to remove a line-of-business restriction be granted merely upon a finding "that 'the rationale for [the restriction] is outmoded by technical developments.' " 552 F.Supp. at 195 (quoting Brief of the United States in Response to the Court's Memorandum of May 25, 1982 at 32-33, *reprinted in* J.A. 882-83); *see also* AT & T Brief in Response to the Court's Memorandum of May 25, 1982 at 18, *reprinted in* J.A. 850 (expressing same standard). The trial court expressly noted that the standard in section VIII(C) would supplant "[t]he test usually applied to a *contested* modification . . . [as] set forth in *United States v. Swift & Co.*" 552 F.Supp. at 195 n. 266 (emphasis added) (citation omitted). Nothing in the court's opinion suggests that section VIII(C) was designed in addition to displace the parties' agreement that a public interest standard would apply to *uncontested* motions to modify section II(D).

This reading of the decree is further supported by an important general rule of decree construction, namely, the presumption that the parties, "absen[t] any expressly stated intention to the contrary," intended to adopt "the ordinary substantive . . . standards that attend decree modification." *United States v. Western Elec. Co.*, 894

F.2d 430, 436 (D.C.Cir.1990). As we have explained, the only *express* intention relating to section VIII(C) was that it would displace the *Swift* test for reviewing contested modifications.

2. *Application of the Public Interest Test to the Motion to Remove the Restriction on Information Services*

Having determined that section VII's public interest test governs uncontested proposals to modify the decree's line-of-business restrictions, we must next examine whether the district court's erroneous reliance on section VIII(C) affected the court's decision to deny the BOCs' unopposed motion to remove the decree's restriction on information services. We conclude that it did, and, consequently, we reverse.

As we have indicated, section VII and section VIII (C) involve different inquiries. Section VII's public interest test directs the district court to approve an uncontested modification so long as the resulting array of rights and obligations is within the *zone of settlements* consonant with the public interest *today*. *Cf. Bechtel Corp.*, 648 F.2d at 666. Section VIII(C) requires the district court to determine whether the petitioning BOC has shown that it could not impede competition in the relevant market as it was believed it could *when the decree was approved*; applying this standard, Judge Greene denied the BOCs' motion to remove the information-services restriction because he found that "[t]here has been no change whatever in" the information services market. 673 F.Supp. at 565.

Under only two circumstances could we discount the possibility that the district court would have reached a different result had it applied section VII rather than section VIII(C). The first would be if the inclusion of the information services restriction was mandatory, not merely permissible, at the time that the decree was

adopted. If market conditions or assumptions in 1982 so constrained the range of permissible settlements that *only* a decree incorporating this restriction could have been approved as consistent with the public interest *then*, it would follow that the parties would need to show that those conditions had abated before the court could approve removal of the restriction *today*.

We cannot say, on the record before us at least, that this condition is met. The Government's case in the *AT & T* antitrust litigation centered exclusively on AT & T's activities in the interexchange-service and equipment-manufacturing markets. *See, e.g.*, COMPETITIVE IMPACT STATEMENT IN CONNECTION WITH PROPOSED MODIFICATION OF FINAL JUDGMENT, 47 Fed.Reg. 7172 (1982). Indeed, because the 1956 consent decree enjoined AT & T "from engaging . . . in any business other than the furnishing of common carrier communications services," *United States v. Western Elec. Co.*, 1956 Trade Cas. (CCH) ¶ 68,246, at 71,138 (D.N.J.1956), and because relatively few information services were provided to the public before the DOJ moved to reopen that decree in 1974, there really was no record to speak of concerning AT & T's activities in the information services market. The parties agreed to the information services restriction as a precautionary measure in light of uncertainty about how divestiture of AT & T would affect the development of this embryonic market. Under these circumstances, it would not have been legal error for the district court to approve the decree had the parties *not* agreed on their own to include the restriction on information services. Consequently, the district court's bare finding that the BOCs failed to show a *change* in market conditions does not suffice to show that the decree, absent the information services restriction, would no longer be " 'within the reaches of the public interest.' " *Bechtel Corp.*, 648 F.2d at 666 (quoting *Gillette Co.*, 406 F.Supp. at 716).

The second condition under which we could disregard the district court's reliance on section VIII(C) would be

if the record conclusively showed that, regardless of whether the parties were *obliged* to include the information services restriction in 1982, removing it would be against the public interest now. Because the "public interest" test must take its meaning from the nation's antitrust laws, *see American Cyanamid Co.*, 719 F.2d at 565, the appropriate question under section VII is whether the proposed modification would be certain to lessen competition in the relevant market. *See generally* 2 P. AREEDA & D. TURNER, ANTITRUST LAW ¶ 330, at 141-42 (1978) ("To remain consistent with antitrust policy, the court should revise the decree that is shown to lessen competition substantially in present circumstances."). Purporting to find that the BOCs would have both the incentive and the ability to cross-subsidize the information-service operations of unregulated affiliates and to discriminate against information-service competitors, the district court concluded that removal of section II(D)(1)'s restriction on information services would be *anticompetitive* under current market conditions. 673 F.Supp. at 565-67.

But because we cannot be certain that these findings were not infected by the court's legal error concerning the proper standard of review, we may not rely on them to support the district court's denial of the BOCs motion. *See Pullman-Standard v. Swint*, 456 U.S. 273, 292, 102 S.Ct. 1781, 1792, 72 L.Ed.2d 66 (1982). The district court's analysis of the contemporary risk of anticompetitive behavior repeatedly incorporates the failure of the BOCs to show a change in market conditions from those existing when the decree became effective:

> There still has been no *significant, relevant change* in the situation.

673 F.Supp. at 564 (emphasis added).

> It is necessary next to determine whether, with respect to the provision of information services, the incentive and ability of the Regional Companies to en-

> gage in anticompettive conduct *remains* the same as it was when the decree was entered. The answer is plain. *There has been no change whatever* in this respect since 1984. . . .

Id. at 565 (emphasis added).

> In short, the reasons cited by the Court in 1982 and in 1984 *are as valid today as they were then.*

Id. at 567 (emphasis added). Consequently, we cannot be sure whether the district court's findings of anticompetitive risk stemmed from its *de novo* assessment of the evidence.

Nor can we say that "the record permits only one resolution of the factual issue[s]" pertinent to determining whether lifting the information-services prohibition would be pro- or anticompetitive. *Pullman-Standard*, 456 U.S. at 292, 102 S.Ct. at 1792. To be sure, the district court had before it evidence to support its findings on the risk of discrimination and cross-subsidization. But the record also contains considerable evidence cutting the other way. The *Huber Report*, in particular, discounts the prospect of anticompetitive behavior, citing the ability of competing information-service providers to bypass the BOCs' local-exchange networks, *see Huber Report* at 6.8, 6.17-6.21, the existence of nontelecommunications substitutes for information services, *see id.* at 6.21-6.23, and the lack of common costs between local-exchange services and *the generation of information, see id.* at 6.35.[28] Because resolving these disputed factual issues "would be wholly inconsistent with the function of an appellate court,"

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[28] As Dr. Huber notes:

> [T]he preparation of the information content itself is one activity that [the BOCs] would have notably little opportunity to cross-subsidize. Running a local telephone exchange does not require reporters, copy editors, joke writers, financial analysts, astrologists, or other information-content providers.

Id. at 6.35 (footnote omitted).

Southern Pacific Communications Co. v. American Tel. & Tel. Co., 740 F.2d 980, 984 (D.C.Cir.1984), *cert. denied*, 470 U.S. 1005, 105 S.Ct. 1359, 84 L.Ed.2d 380 (1985), we are constrained to remand the case for further factfinding, pursuant to the proper legal standard. *See Pullman-Standard*, 456 U.S. at 292, 102 S.Ct. at 1792.

In sum, we find that the district court erred in applying section VIII(C) rather than section VII's public interest standard to the BOC's unopposed motion to lift the decree's information-services restriction in its entirety. And because we are unable to say that the district court would have reached the same result had it applied the proper legal standard, we reverse the court's decision and remand the case for further proceedings. In reconsidering the BOCs' motion, the district court should determine whether removal of the information-services restriction as applied to the generation of information would be anticompetitive under *present* market conditions.[29] The court should also bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities "is the one that will *best* serve society," but only to confirm that the resulting "settlement is 'within the *reaches* of the public interest.'" *Bechtel Corp.*, 648 F.2d at 666 (quoting *Gillette Co.*, 406 F.Supp. at 716 (emphasis added).

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[29] We are also concerned with the practical difficulty of enforcing a merely *partial* repeal of the information-services ban; as the trial court recognized, significant disputes can be expected to arise concerning whether the BOCs are using their right to transmit the information of others as a cover for generating their own. *See* 673 F.Supp. at 596. Because it is clearly in the public interest to minimize the district court's oversight responsibilities under the decree, *see id.* at 599, the district court on remand should also consider whether the residual anticompetitive risks associated with lifting the restriction on generation of information are sufficiently great to outweigh the administrative burdens on the court of policing this limited prohibition.

IV.

The Public Service Commission of the District of Columbia ("DC-PSC") is the only party that appeals the district court's decision to allow the BOCs to participate in non-telecommunications markets and limited information transmission and storage activities.

The BOCs assert that in the absence of some actual or threatened injury to DC-PSC or some congressional enactment conferring standing, DC-PSC has no right to appeal the district court's decision. DC-PSC responds that it was granted the status of a limited intervenor in the district court proceedings and that it has the right to appeal the district court's judgment. DC-PSC bases this claim on an unclear combination of the following reasons: the district court granted the right to appeal its decision to all limited intervenors; the district court's decision to lift the restrictions at issue will cause DC-PSC to suffer specific injury as consumer and regulator; the law of standing applies only to plaintiffs and not to intervenors; an agency may intervene in an appeal from proceedings that may affect its ability to carry out its statutory functions; and DC-PSC may represent the interests of District of Columbia residents on appeal in a *parens patriae* capacity.

As a preliminary matter, despite the BOCs' assertions to the contrary, DC-PSC was a limited intervenor in both district court decision under review. By its order dated March 9, 1987, the district court granted DC-PSC's motion for leave to intervene. On October 14, 1988, the district court ordered that all those parties that had been granted limited intervenor status on February 26, 1987 in the proceedings that culminated in the issuance of the September 10, 1987 decision were to be considered limited intervenors for purposes of the decision issued on March 7, 1988. Because DC-PSC's motion to intervene was filed out of time and was granted on March 9 instead of on February 26, the BOCs assert that DC-PSC

is not a limited intervenor with respect to the March 7 decision. Although the BOCs may be technically correct, it would be unduly formalistic for this court to convert an obvious oversight of the district court into an independent basis for barring appeal.

DC-PSC's status as an intervenor does not, however, guarantee that it has standing to appeal the district court's decisions. DC-PSC seems to be under the impression that the district court, by conferring the status of limited intervenor in the proceedings below, can confer standing on DC-PSC in this court to appeal the district court's decisions. The Supreme Court has stated, however, that

> [a]lthough intervenors are considered parties entitled, among other things, to seek review by this Court, *Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335, 338 [65 S.Ct. 1166, 1167, 89 L.Ed 1649] (1945), an intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III.

Diamond v. Charles, 476 U.S. 54, 68, 106 S.Ct. 1697, 1706, 90 L.Ed.2d 48 (1986). Thus, because DC-PSC alone challenges the district court's decision to lift the restrictions at issue, this court must determine whether DC-PSC independently satisfies the article III requisites for standing to appeal.

The Supreme Court has held that in order to have standing, a party must demonstrate an injury in fact fairly traceable to the conduct it is challenging and likely to be redressed by the relief it has requested. *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984). While the necessary "injury" is not susceptible to precise definition, it must be "distinct and palpable," *Warth v. Seldin*, 422 U.S. 490, 501, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975), and not

merely hypothetical, abstract, or conjectural. *Los Angeles v. Lyons*, 461 U.S. 95, 101-02, 103 S.Ct. 1660, 1664-65, 75 L.Ed.2d 675 (1983). As noted above, DC-PSC claims to be constitutionally "injured" both as consumer and regulator. We disagree.

DC-PSC's argument that it has standing as a consumer, if accepted, would mean that any consumer of telecommunications service in the country would have standing to challenge the consent decree. This is far too broad; it approaches the kind of diffuse and unparticularized "taxpayer" standing that the Supreme Court consistently has rejected. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 476-82, 102 S.Ct. 752, 760-64, 70 L.Ed.2d 700 (1982).

DC-PSC's claim that it has standing because its regulatory function could be impaired by the removal of the restrictions at issue is equally unpersuasive. It is hard to see exacly how DC-PSC's ability to regulate could be harmed by the district court's judgment. Even though DC-PSC has no power to regulate Bell Atlantic, it does regulate Bell Atlantic's subsidiary, Chesapeake and Potomac Telephone Company ("C & P"). The fact that Bell Atlantic might inappropriately cross-subsidize other businesses by drawing funds from C & P—and thereby reduce the quality or increase the cost of service to C & P's customers—does not impede DC-PSC's power to require C & P to provide reasonably safe and adequate service at just and reasonable rates to its customers. DC-PSC may claim injury as a regulator only if it can demonstrate that cross-subsidization would prevent it from *regulating* C & P; it has not done so.

Finally, we reject DC-PSC's contentions that it can bring this appeal in a *parens patriae* capacity. Section 15c of Title 15 of the United States Code provides that any attorney general of a state may bring a civil action

in a *parens patriae* capacity to secure relief from antitrust violations. "State attorney general" is defined as

> the chief legal officer of a State, or any other person authorized by State law to bring actions under section 15c of this title, and includes the Corporation Counsel of the District of Columbia. . . .

15 U.S.C. § 15g(1). The BOCs argue that this language means that only the Corporation Counsel is authorized to bring such actions. DC-PSC argues that the grant is not exclusive, because DC-PSC's General Counsel is implicitly authorized to bring § 15c actions by D.C. Code § 43-405, which authorizes the General Counsel "to commence and prosecute all actions and proceedings directed or authorized by the Commission." On balance, we conclude that the general grant of power in § 43-405 is insufficient to authorize § 15c suits by DC-PSC's General Counsel in the absence of some more explicit authorization by Congress or the District of Columbia Council.

V.

With the exception of the district judge's ruling dealing with information services—which we reverse and remand—we affirm.

So ordered.

APPENDIX D

EXCERPTS FROM U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION MANUAL

CONSENT DECREE STANDARD PROVISIONS

Dated October 18, 1987
(Second Edition)
Page IV-76

* * * *

9. *Retention of Jurisdiction*

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

10. *Statement of Public Interest*

Entry of this Final Judgment is in the public interest.

Dated:

_____

[Name]
United States District Judge

STATUTES INVOLVED

APPENDIX E

Sections (e) & (f) of The Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(e) & (f)

(e) Public interest determination

Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—

(1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing on the adequacy of such judgment;

(2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

(f) Procedure for public interest determination

In making its determination under subsection (e) of this section, the court may—

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or

advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) of this section concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

FILED
OCT 26 1993
OFFICE OF THE CLERK

No. 93-318

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1993

CONSUMER FEDERATION OF AMERICA, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly articulated the "public interest" standard that applies to judicial review of consensual modifications of antitrust consent decrees.

2. Whether the court of appeals correctly interpreted section VIII(C) of the consent decree entered in the government's antitrust suit against AT&T by concluding that it does not apply to consensual motions to modify the decree's line-of-business restrictions.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 993 F.2d 1572. The opinion of the district court (Pet. App. 24a-75a) is reported at 767 F. Supp. 308. A prior opinion of the court of appeals in this case (Pet. App. 76a-125a) is reported at 900 F.2d 283.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 1993. The petition for a writ of certiorari was filed on August 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following proceedings on remand from the D.C. Circuit's 1990 Triennial Review Opinion, Pet. App. 76a-125a, the district court granted the Bell Operating Companies' (BOCs) motions to modify the consent decree entered in the government's antitrust case against AT&T. The modification, which the United States supported and AT&T (the only other party to the decree) did not oppose, removed the provision barring the BOCs from providing "information services," which include services such as LEXIS by which information stored on a computer may be accessed by telephone.[1] Pet. App. 24a-75a. The court of appeals affirmed. Pet. App. 1a-23a.

1. The *AT&T* antitrust consent decree, as entered in 1982, prohibited the BOCs from providing interexchange (long distance) services and information services, manufacturing or providing telecommunications equipment, manufacturing customer premises equipment, and engaging in most other businesses except local exchange telecommunications. *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 227-228 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983). In 1987, after the Department of Justice had conducted an extensive study of competition in the telecommunications industry,

[1] The decree defines "information service" as: "[T]he offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications." *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 229 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).

the United States and the BOCs moved for removal of the decree's prohibitions with respect to information services, equipment, and non-telecommunications business. The BOCs, over the goverment's opposition, also moved for removal of the prohibition on interexchange services. AT&T opposed removal of the interexchange services and equipment prohibitions, but did not oppose removal of the information services prohibition.

The district court modified the information services restriction to allow the BOCs to provide limited "gateway" transmission services and voice storage and retrieval services. But accepting arguments by various intervenors, many of whom would face competition from the BOCs if the BOCs were allowed to provide information services, the court retained the prohibition on all other information services. The district court also removed the non-telecommunications business prohibition, but retained the equipment and interexchange prohibitions. *United States* v. *Western Elec. Co.*, 673 F. Supp. 525 (D.D.C. 1987); *United States* v. *Western Elec. Co.*, 714 F. Supp. 1 (D.D.C. 1988).

2. In its Triennial Review Opinion, the D.C. Circuit affirmed the district court's denial of the BOCs' motions to remove the decree's prohibitions on interexchange services and equipment manufacturing. Pet. App. 76a-125a. The court of appeals also held that because the United States supported and AT&T did not oppose the BOCs' motions to remove the information services restriction, the common law "public interest" standard incorporated in section VII of the decree applied rather than the more restrictive

standard set out in section VIII(C).[2] *Id.* at 113a-117a. The court of appeals remanded for reconsideration of the information services motions under the public interest standard, which directs the district court to consider whether an uncontested modification "is within the *zone of settlements* consonant with the public interest *today*.'" *Id.* at 10a, quoting *id.* at 117a. This Court denied a petition for a writ of certiorari filed by some of the intervenors. *MCI* v. *United States*, 498 U.S. 911 (1990).[3]

3. After further briefing and argument on remand, the district court granted the motions for removal of the information services restriction. Pet. App. 24a-75a. The district court made clear that it still disagreed with the Department's conclusions that (1) regulatory, technical, and market constraints make it unlikely that the BOCs would engage in anticompetitive conduct; and (2) removal of the restriction would promote competition in information services. *Id.* at 29a-62a. But the district court concluded that it was required to grant the motions under the public interest standard articulated by the court of appeals because it could not conclude that removal of the

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[2] Section VIII(C) provides: "The [line-of-business] restrictions imposed upon the separated BOCs by virtue of section II(D) shall be removed upon a showing by the petitioning BOC that there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." 552 F. Supp. at 231.

[3] The primary question presented was whether the court of appeals correctly determined that the public interest standard of section VII, rather than the stricter standard set out in section VIII(C), applies to modifications that are not opposed by any party to the consent decree.

prohibition would be certain to lessen competition. *Id.* at 62a-71a.

4. The court of appeals affirmed. Pet. App. 1a-23a. The court of appeals held that "[a]lthough the district court in certain places mischaracterized the standard under which it was to review the Department's proposal, the evidence was such that, under the standard laid down in the Triennial Review Opinion, rejection of the Department's proposal would have been error." *Id.* at 9a.

The court reaffirmed its Triennial Review Opinion holdings that the "public interest test" applies to modifications assented to by all parties to a decree and that that test "directs the district court to approve an uncontested modification so long as the resulting array of rights and obligation is within the *zone of settlements* consonant with the public interest *today*." Pet. App. 10a, quoting *id.* at 117a. The court of appeals further explained: "[I]t was not up to the court to reject an agreed-on change simply because the proposal diverged from *its* view of the public interest. Rather, the court was bound to accept any modification that the Department (with the consent of the other parties, we repeat) reasonably regarded as advancing the public interest." *Id.* at 10a. The court of appeals cautioned that the Triennial Review Opinion did not require "abject deference to the Department," but it also emphasized that the district court has a limited role and is not to engage in *de novo* review. *Id.* at 11a-12a. Thus, "the district court may reject an uncontested modification only if it has exceptional confidence that adverse antitrust consequences will result—perhaps akin to the confidence that would justify a court in overturning the predic-

tive judgments of an administrative agency." *Id.* at 12a. The court of appeals noted that this "view accords with other courts' understanding of the court-agency relation under the Tunney Act," 15 U.S.C. 16, which governs the entry of consent decrees. Pet. App. 12a (citing *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); *United States* v. *Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508 (W.D. Mo. May 17, 1977); *United States* v. *Yoder Bros.*, 1989-2 Trade Cas. (CCH) ¶ 68,723, at 61,795 (N.D. Ohio Apr. 28, 1986)).

The court of appeals then reviewed the record evidence in this case as to the potential effects of removing the information services restriction. Finding "unclear what deference the district court actually extended," the court concluded that "the record before the court was such that any district court rejection of the proposed modification would have been reversible error." Pet. App. 13a-14a. The court determined that the Department's conclusion that there was no substantial risk that removal of the information services restriction would lessen competition was supported by "an ample factual foundation," *id.* at 23a, and held that the district court "was clearly erroneous to the extent that it found the Department's conclusion unreasonable," *id.* at 15a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Contrary to petitioners' contention (Pet. 12-17), the court of appeals properly understood the role of

the district court in reviewing consensual motions to enter or modify a consent decree in a government antitrust case. When the United States seeks an injunction in a contested proceeding, the district court is charged with responsibility for finding facts as to the existence of a violation and determining what relief is appropriate. When the United States and the defendant agree to the entry or modification of a decree, however, the district court's role is different because the government does not need to prove that a violation has occurred and the parties are in agreement that the relief the government seeks is appropriate.

As the court of appeals properly acknowledged, when the government and the defendant reach agreement, it is not the role of the court to assume the prosecutorial function of determining "whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." Pet. App. 10a, quoting 900 F.2d at 309; in turn quoting *United States* v. *Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981); in turn quoting *United States* v. *Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (internal quotations marks omitted). As the Ninth Circuit emphasized in *Bechtel*: "The balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree." 648 F.2d at 666 (citation omitted). See also, *e.g.*, *United*

States v. *Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,979-71,980 (W.D. Mo. May 17, 1977) (while an "independent public interest determination" is required, the court is not to make a "*de novo* determination of facts and issues").

The court of appeals did not require automatic approval of consent decrees, as petitioners suggest (Pet. 13-14). Indeed, the court emphasized that a standard requiring "rubber-stamp deference" would have been legally erroneous. Pet. App. 13a-14a.[4] Under the public interest standard articulated by the court of appeals, the government must explain the competitive basis for and the impact of its proposal.[5] The public is entitled to comment. The district

[4] The court of appeals acknowledged that the district court's opinion was unclear as to how much deference the district court actually extended. Pet. App. 13a. The court of appeals concluded that a remand was unnecessary only after examining in detail the record evidence and determining that there was an "ample factual foundation for the judgment call made by the Department of Justice," and that "[i]nsofar as the district court may be considered to have found the contrary, the finding was clearly erroneous." *Id.* at 23a. Petitioners do not challenge that holding.

[5] The procedures for review of consent decrees are codified in the the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, which is known as the Tunney Act. In proceedings to modify or terminate antitrust decrees, the Department follows analogous procedures. See United States Dep't of Justice, Antitrust Division Manual § III(E) (2d ed. 1987). The United States does not agree that the Tunney Act applies to decree modifications, but we do not disagree with the court of appeals' conclusion that uncontested modifications "should be approved so long as the modifications satisfy the 'public interest' standard embodied in the Tunney Act." Pet. App. 91a; see *id.* at 10a.

court reviews the proposed decree, the government's explanation, and the public's comments in order to ensure that there is no malfeasance and that the government is acting reasonably in consenting to the decree. See, *e.g.*, *Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (court inquires "whether [the Department of Justice's] explanations are reasonable under the circumstances").[6] The government does not bear the same evidentiary burden it would bear in a contested proceeding to establish that the relief it seeks is required to vindicate the public interest in competition. See, *e.g.*, *Gillette*, 406 F. Supp. at 715.[7] The court plays the role properly

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[6] Other courts have used similar formulations of the public interest inquiry, recognizing the discretion afforded to the Department, which represents the public interest in competition (*United States* v. *Associated Milk Producers, Inc.*, 534 F.2d 113, 116-117 (8th Cir.), cert. denied, 429 U.S. 940 (1976)). See, *e.g.*, *United States* v. *Columbia Artists Management, Inc.*, 662 F. Supp. 865, 869-870 (S.D.N.Y. 1987); *United States* v. *Yoder Bros.*, 1989-2 Trade Cas. (CCH) ¶ 68,723, at 61,795 (N.D. Ohio Apr. 28, 1986); *United States* v. *Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985); *United States* v. *National Finance Adjusters, Inc.*, 1985-2 Trade Cas. (CCH) ¶ 66,856, at 64,248 (E.D. Mich. Aug. 9, 1985); *United States* v. *G. Heileman Brewing Co.*, 563 F. Supp. 642, 647 (D. Del. 1983); *United States* v. *Stroh Brewery Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,804, at 71,960 (D.D.C. June 4, 1982); *United States* v. *National Broadcasting Co.*, 449 F. Supp. 1127, 1143-1144 (C.D. Cal. 1978); *United States* v. *Associated Milk Producers, Inc.*, 394 F. Supp. 29, 44-45 (W.D. Mo. 1975), aff'd, 534 F.2d 113 (8th Cir.), cert. denied, 429 U.S. 940 (1976).

[7] Petitioners' argument that entry of a decree cannot be in the public interest if the district court finds that it will be anticompetitive (Pet. 13-14) ignores the predictive nature of the inquiry, as well as the difference between litigated cases

assigned to it: assuring that the decree it enters falls within the "reaches of the public interest." *Bechtel*, 648 F.2d at 666, quoting *Gillette*, 406 F. Supp. at 716.[8]

2. Contrary to petitioners' contention (Pet. 18-22), the court of appeals' decision does not conflict with the Second Circuit's decision in *United States* v. *American Cyanamid Co.*, 719 F.2d 558 (1983), cert. denied, 465 U.S. 1101 (1984). *Cyanamid* turned on the applicability of Part XI of the *Cyanamid* decree to an unopposed motion to vacate that decree. Part XI expressly conditioned removal of the decree's restrictions on a showing that "the effect of such relief will not be substantially to lessen competition." 719 F.2d at 561. The court of appeals held, erroneously in our

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and consent judgments. The question is not, as petitioners suggest (*ibid.*), whether the court must enter a decree that is anticompetitive, but whether it is the role of the Department of Justice or the court to predict whether, on balance, the effect of the decree will be procompetitive. In the consent decree situation, the public interest standard assigns that role to the Department, so long as it has a reasonable basis for its prediction.

[8] Petitioners' contention (Pet. 12-17) that the D.C. Circuit "violate[d] the Tunney Act" and "reversed [its] statutory command" ignores the cases that interpret that Act in a manner fully consistent with the D.C. Circuit's decision. Contrary to petitioners' contention, the Tunney Act requirement that the court "determine that the entry of [a proposed judgment] is in the public interest" does not in itself resolve the question of the scope of the court's inquiry. The D.C. Circuit's formulation of the public interest inquiry expressly incorporates the legislative intention to prohibit judicial "rubber stamping," and the legislative history supports the courts' uniform conclusion that the Act preserves the Department of Justice's right to settle litigation provided that it acts in good faith and with reasonable competitive justification. See, *e.g.*, *Gillette*, 406 F. Supp. at 715.

view, that Section XI of that particular decree applied to consensual as well as contested termination motions and that the district court had erred in applying the public interest standard. But as the United States argued in opposing the private defendant's petition for a writ of certiorari in that case, the *Cyanamid* decision and its rationale are inseparable from the special standard contained in the *Cyanamid* decree. See 719 F.2d at 559, 564-567.

3. Petitioners also renew their attack (Pet. 22-26) on the D.C. Circuit's 1990 holding that the public interest standard, rather than the more stringent standard of section VIII(C), applies to motions for decree modification that are not opposed by any of the parties to the decree (the United States, the BOCs and AT&T).[9] Review is not warranted.

In the Triennial Review Opinion, the D.C. Circuit carefully analyzed the language of the *AT&T* consent decree, considering its history and accepted principles of decree construction. The D.C. Circuit concluded that section VIII(C) was added only to supplant the test usually applied to a contested modification as set forth in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), and did not alter the common law rule that an uncontested modification should be subject to the more lenient public interest standard. See Pet. App. 113a-117a. We submit that this holding is correct. In any event, the court of appeals' holding on the scope of

[9] MCI and other petitioners raised that issue in their 1990 petition for certiorari, which this Court denied. *MCI* v. *United States*, 498 U.S. 911 (1990).

section VIII(C) was based squarely on interpretation of the terms of the *AT&T* decree.[10]

Because it was based on the language and history of the *AT&T* decree, the holding in the Triennial Review Opinion on the scope of section VIII(C) establishes no clear precedent for any other decree. In fact, the effect of the court of appeals' ruling on that issue is uncertain even with respect to further proceedings in this case. The D.C. Circuit has held that section VIII(C)—and not the public interest standard—governs BOC motions for modification of the line-of-business restrictions if the modifications are supported by the United States but opposed by AT&T, *United States* v. *Western Elec. Co.*, 969 F.2d 1231 (D.C. Cir. 1992), cert. denied, 113 S. Ct. 1363 (1993), and AT&T consistently has opposed removal of the interexchange and manufacturing restrictions that the decree places on the BOCs.

[10] As in the petition for a writ of certiorari that was filed in 1990, petitioners argue (Pet. 23) that the Triennial Review Opinion conflicts with *United States* v. *Atlantic Refining Co.*, 360 U.S. 19 (1959). There is no merit to that contention. In *Atlantic Refining*, the Court refused to construe a consent decree contrary to its terms "simply because another reading might seem more consistent with the Government's reasons for entering into the agreement in the first place." *Id.* at 23-24. The court of appeals did not interpret the *AT&T* consent decree contrary to its terms.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 93-318

IN THE
Supreme Court of the United States
October Term, 1993

CONSUMER FEDERATION OF AMERICA, MCI COMMUNICATIONS CORPORATION, NEWSPAPER ASSOCIATION OF AMERICA, INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA, ASSOCIATION OF DIRECTORY PUBLISHERS, COMMERCE CLEARING HOUSE, INC., COX ENTERPRISES, INC., DIALOG INFORMATION SERVICES, INC., GE INFORMATION SERVICES, INFORMATION INDUSTRY ASSOCIATION, INTERNATIONAL COMMUNICATIONS ASSOCIATION, MCGRAW-HILL, INC., MEAD DATA CENTRAL, INC., NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL CABLE TELEVISION ASSOCIATION, INC., PRODIGY SERVICES COMPANY, TOWARD UTILITY RATE NORMALIZATION, WEST PUBLISHING COMPANY, THE WISCONSIN CITIZENS' UTILITY BOARD, INC.
Petitioners,

v.

UNITED STATES OF AMERICA, AMERITECH, BELL ATLANTIC CORPORATION, BELLSOUTH CORPORATION, NYNEX CORPORATION, PACIFIC TELESIS GROUP, SOUTHWESTERN BELL CORPORATION, U S WEST, INC., *ET AL.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT REGIONAL BELL OPERATING COMPANIES

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RULE 29.1 STATEMENT

Respondent Regional Bell Operating Companies ("BOCs") are publicly held corporations principally in the business of providing communications services and products to the general public.

Ameritech. Ameritech Corporation is a publicly held corporation which owns the following subsidiaries which have securities in the hands of the public:

Illinois Bell Telephone Company
Indiana Bell Telephone Company, Inc.
Michigan Bell Telephone Company
The Ohio Bell Telephone Company
Wisconsin Bell, Inc.
Telecom Corporation of New Zealand Limited

Bell Atlantic. Bell Atlantic Corporation is a publicly held corporation which owns the following subsidiaries which have securities in the hands of the public:

The Bell Telephone Company of Pennsylvania
The Chesapeake and Potomac Telephone Company
The Chesapeake and Potomac Telephone Company of Maryland
The Chesapeake and Potomac Telephone Company of Virginia
The Chesapeake and Potomac Telephone Company of West Virginia
The Diamond State Telephone Company
New Jersey Bell Telephone Company
Bell Atlantic Systems Leasing International, Inc.
Bell Atlantic Tricon Leasing Corp.
Bell Atlantic Financial Services, Inc.
Bell Atlantic Mobile Systems, Inc.
Bell Atlantic Network Funding Corp.
Bell Atlantic Capital Funding Corp.
Bell Atlantic Telecom Corporation of New Zealand Limited

BellSouth. BellSouth Corporation is a publicly held corporation, and its wholly owned subsidiary, BellSouth Telecommunications, Inc., both in its own name and in the names of its predecessors, Southern Bell Telephone and Telegraph Company, and BellSouth Capital Funding Corporation, have securities in the hands of the public. BellSouth Capital Funding Corporation—Australia Limited, a partially owned subsidiary of BellSouth Capital Funding Corporation, has issued securities that are in the hands of the public.

NYNEX. NYNEX Corporation is a publicly held corporation. It has no publicly held parent, subsidiary or affiliate.

Pacific Telesis Group. Pacific Telesis Group is a publicly held corporation, and its subsidiaries Pacific Bell and Nevada Bell have securities in the hands of the public.

Southwestern Bell. Southwestern Bell Corporation is a publicly held corporation, and its subsidiaries Southwestern Bell Telephone Company and Southwestern Bell Capital Corporation have securities in the hands of the public.

U S WEST. U S WEST, Inc. is a publicly held corporation which owns the following subsidiaries which may have securities in the hands of the public:

The Mountain States Telephone and Telegraph Company
Northwestern Bell Telephone Company
Pacific Northwest Bell Telephone Company
U S WEST NewVector Group, Inc.
U S WEST Capital Funding, Inc.
U S WEST Financial Services, Inc.
BetaWEST Properties, Inc.

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INTRODUCTION

This case involves a fact-specific application of the settled legal standard for a consent decree modification that is unopposed by any party to the decree. Originally, federal courts developed this standard as a matter of federal common law; it was then incorporated by Congress in the Tunney Act, 15 U.S.C. § 16(b)-(h). The Court of Appeals' decision below applying this standard is entirely consistent with long-settled precedent, there is no conflict among the circuits, and there is no reason for this Court to grant the petition for a writ of certiorari.

The real question in this case is a matter not of law but of telecommunications policy: whether the Bell Operating Companies, made independent by the 1982 AT&T consent decree, will be permitted to enter the "information services" market (composed of such services as LEXIS, Prodigy, and so on), or whether industry incumbents — many of whom are petitioners here — will succeed in restricting competition to the detriment of consumers nationwide. The Department of Justice, together with other federal agencies, has carefully studied the matter and has decided in favor of telephone company entry and greater competition. Petitioners urge this Court to consider the "practical importance" of this case in deciding whether to grant certiorari. Petition for a Writ of Certiorari ("Pet.") 11. Yet it is precisely the importance of the issue, the intensely factual nature of the policy debate, and the dynamic character of the telecommunications industry that militate against, rather in favor of, the grant of certiorari. As this Court has observed, "federal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984).

Not surprisingly, petitioners have attempted to transmute this policy debate into a legal one. But they can do so only by resorting to hyperbole and gross distortion of the opinion below. Petitioners claim that the decision below "strips" federal district courts of their proper role in deciding whether to approve a decree modification, by holding that a district

court "is not permitted to make an independent judicial determination of the competitive impact of a proposed modification to an antitrust consent decree." Pet. 2-3.

This is simply untrue. The Court of Appeals below expressly *rejected* the notion that a district court must show "abject deference" to the Department of Justice's analysis of a proposed modification's competitive impact, or that a district court must engage in "total, rubber-stamp deference." *United States v. Western Electric Co.*, 993 F.2d 1572, 1576, 1577 (D.C. Cir. 1993); Pet. App. 11a, 13a-14a. The Court of Appeals explained that it did not intend any "more deference than is conventional between court and agency on expert, predictive judgments." 993 F.2d at 1577; Pet. App. 13a. The crux of the court's holding was simply that it is "not up to [a district] court to reject an agreed-on change simply because the proposal diverged from *its* view of the public interest." *Id.* at 1576 (emphasis in original); Pet. App. 10a. This is the sort of routine application of settled legal principles that should not trigger this Court's review.

STATEMENT OF THE CASE

A. The Origins of the Information Services Restriction

This case concerns the removal of an obsolete provision of the 1982 AT&T consent decree prohibiting the Bell Operating Companies from providing "information services," defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may conveyed via telecommunications."[1] This decree, sometimes called the "MFJ," was entered after the parties consented to a review by the district court to determine whether the decree was "within the reaches

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[1] *United States v. AT&T*, 552 F. Supp. 131, 229 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

of [the] public interest." *United States v. AT&T*, 552 F. Supp. 131, 145, 151 (D.D.C. 1982) (Greene, J.), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

The Government's antitrust case against AT&T had centered exclusively on AT&T's activities in the interexchange service and equipment manufacturing markets. There were no allegations, or evidence presented, of antitrust violations in the information services market. Indeed, "there really was no record to speak of concerning AT&T's activities in the information services market." *United States v. Western Electric Co.*, 900 F.2d 283, 307 (D.C. Cir.) (*per curiam*) ("*Triennial Review Opinion*"), *cert. denied*, 498 U.S. 911 (1990); Pet. App. 118a. "The parties agreed to the information services restriction as a precautionary measure in light of uncertainty about how divestiture of AT&T would affect development of this embryonic market." *Id.* Accordingly, the D.C. Circuit has already held, in a case in which this Court denied review, that the information services restriction was not required to be in the decree in the first place. *See id.*

Thus, while the district court carefully noted in 1982 that there were no findings or admissions of antitrust violations even with respect to the interexchange service and equipment manufacturing claims that were the centerpiece of the Government's case,[2] the absence of any documented need for the information services restriction is all the more striking. It has *never* played the traditional role of a provision in a consent

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[2] The district court noted: "It would be inappropriate for the Court at this juncture to draw definitive conclusions with regard either to the sufficiency of the evidence to sustain a finding of liability or to the validity of AT&T's various legal and factual defenses. The Court is not called upon, in this public interest proceeding, to render a final judgment on this case; indeed, not all the evidence that may bear on the issues has yet been adduced." 552 F. Supp. at 161. Accordingly, the decree specifically provided that none of its terms or provisions shall "constitute any evidence against, an admission by, or an estoppel against any party or BOC." MFJ § III, 552 F. Supp. at 211.

decree — to remedy or prevent a violation of the law apparent from the record of a case.

B. The Triennial Review

When the decree was negotiated, both the Department and the district court recognized that the need for line-of-business limits on the Bell Companies, including the information services restriction, "will disappear" and that, in time, "their sole effect would be to limit competition by preventing the entry of a viable competitor." 552 F. Supp. at 194-95 & n.264. Accordingly, the Department pledged to make triennial reports on the continuing need for these restrictions, with the view of eliminating them "at the earliest possible date" when competitive conditions warranted. Brief of the United States in Response to the Court's Memorandum of May 25, 1982, in *United States v. Western Electric Co.*, No. 82-0192 (D.D.C.), at 31.

By the first such review in 1987, it was plain that the purely prophylactic information services restriction was proving counterproductive in practice. The Department of Justice issued a comprehensive report explaining that, "while it was assumed at the time the decree was entered that a general prohibition on BOC provision of information services would not deprive the public of access to various types of information services of significant efficiencies, this assumption has been disproved by subsequent developments." Report and Recommendations of the United States, filed Feb. 2, 1987, at 152-53. The Department added that "[c]onsumers have been deprived of some services already, and the potential that efficiency will be sacrificed or that services made possible by new technical developments will be unavailable to BOC customers is likely to be even greater in the future." *Id.*

The Department also explained that the risks of anticompetitive conduct by the Bell Companies were slight. "In the five years since the decree was entered, the relationship between information services and the local exchange has diverged in

important respects from the traditional bottleneck relationship anticipated at the time the decree was entered." *Id.* at 126-27. DOJ noted the large size of many competitors and the increasing globalization of the information services market and concluded that there was no realistic prospect that the Bell Companies would obtain market power if allowed to enter the information services market. *Id.* at 112-13, 122. DOJ determined that various regulatory protections "should mitigate, even if they do not completely eliminate," the risks of anticompetitive behavior. *Id.* at 133.[3]

Accordingly, in 1987 the Department, joined by the Bell Companies, moved the district court to eliminate the information services ban from the decree. This motion was unopposed by any party to the decree, so that the parties' consent that had provided the sole basis for the information services ban had disappeared. Nonetheless, the district court did not apply the common-law "public interest" test of Section VII of the decree — a test which the district court had itself applied to the original decree in 1982, and which the parties had explicitly agreed would govern future consensual modifications. *See Triennial Review Opinion*, 900 F.2d at 305-07; Pet. App. 113a-117a. Instead, the district court held that circumstances had not changed sufficiently to warrant relief under Section VIII(C) of the decree, which requires a petitioning Bell Company to show that "there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." *United States v.*

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[3] In reaching these conclusions, the Department relied in part on an exhaustive report by Dr. Peter Huber, *The Geodesic Network: 1987 Report on Competition in The Telephone Market*, which documented that opportunities for anticompetitive conduct by Bell Companies were "slight" because of economic, technical, and regulatory constraints, *id.* at 3.37, 6.18 to 6.20, 6.23, 6.30 to 6.32, 6.35, 6.39, and that the entry of powerful firms — like American Express, Dow Jones, and Time, Inc. — into the information services market meant that "[i]t is not likely" that a Bell Company "will be able to leverage its one-region network to impede competition on that kind of scale." *Id.* at 6.51.

Western Electric Co., 673 F. Supp. 525, 532-35, 567 (D.D.C. 1987).

C. The First Appeal and Petition for Certiorari

On appeal, the D.C. Circuit rejected the use of the Section VIII(C) test for uncontested motions to modify the decree. Looking to the history and language of the decree, the court found that there was "little question that the parties expected uncontested motions to be governed by" the more permissive public interest test of Section VII. *Triennial Review Opinion*, 900 F.2d at 306; Pet. App. 115a. The court therefore held that, when all the parties to a decree assent to a particular modification, the Section VII public interest test "directs the district court to approve an uncontested modification so long as the resulting array of rights and obligations is within the *zone of settlements* consonant with the public interest *today*." *Id.* at 307 (citation omitted; emphasis in original); Pet. App. 117a.

Essentially the same group of petitioners as those before this Court today then brought a petition for certiorari, raising many of the same arguments, albeit in slightly different form, that are contained in the instant petition. In 1990, the petitioners complained not only that the *Triennial Review Opinion* had applied Section VII of the decree rather than Section VIII(C), but also that the decision erred in interpreting the district court's role under Section VII as a limited one. The D.C. Circuit's 1990 ruling, according to petitioners, was a "virtual directive to Judge Greene to let the regional Bells enter the information services market." Petition for Certiorari in No. 90-9, at 16. Petitioners argued that the Court of Appeals had improperly established a "flexible test," *id.* at 25, and contended that it should instead have followed the supposedly more stringent approach of *United States v. American Cyanamid Co.*, 719 F.2d 558 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984), which petitioners maintained was an "indistinguishable" case. Petition for Certiorari in No. 90-9, at 18 & n.30. This Court denied certiorari without comment or dissent. 498 U.S. 911 (1990).

D. The Remand to the District Court

On remand before the district court, DOJ updated the extensive "experience and the information it ha[d] obtained in the course of administering and enforcing the decree," considered various newly available studies of information services markets, reviewed current regulatory developments, and held numerous meetings with interested persons. Memorandum of the United States, in *United States v. Western Electric Co.*, No. 82-0192 (D.D.C.), filed Aug. 22, 1990, at 9. The Department concluded that: (1) significant competitive benefits can be expected from new entry by seven firms representing two-thirds of the telecommunications industry (*id.* at 35-41); (2) the Bell Companies have now engaged in related lines of business (such as customer premises equipment (CPE)), and other regulated telecommunications carriers — including GTE and independent and foreign telephone companies — have now provided information services for many years; yet none of these firms has obtained market power (*id.* at 15, 25 n.32, 34-35, 39-40); (3) substantial market constraints will prevent the Bell Companies from lowering output or raising price in information services (*id.* at 27-35); (4) major practical impediments will prevent any acquisition of market power through covert discrimination against competitors or cross-subsidization of information services (*id.* at 16-21); and (5) regulatory constraints will deter any Bell Company from launching a campaign to lower output or raise price through illegal practices (*id.* at 22-27). The Department also determined that administering the information services restriction consumed finite enforcement resources that could be better deployed in other ways. Reply of the United States, in *United States v. Western Electric Co.*, No. 82-0192 (D.D.C.), filed Jan. 18, 1991, at 29-31.

The Department's policy judgment was powerfully supported by the Federal Communications Commission (FCC); by the National Telecommunications and Information Administration (NTIA) of the Department of Commerce; by such notable economists as Professors Jerry Hausman and

Franklin Fisher, both of MIT, and Nobel laureates Kenneth Arrow and George Stigler; by Alfred Kahn, the nation's premier expert on regulated markets; by the National Association of Regulatory Commissioners (NARUC) and numerous state commissions, including those of California, Florida, Illinois, Michigan, Pennsylvania, Vermont, Virginia, West Virginia, and Wisconsin; and by a wide array of public interest and consumer groups.[4]

Faced with this overwhelming showing, the district court granted the motion to lift the information services restriction. *United States v. Western Electric Co.*, 767 F. Supp. 308, 327 (D.D.C. 1991); Pet. App. 62a-63a. The district court understood that it was required "to decide only whether the settlement is within the reaches of the public interest." *Id.* at 329 n.101; Pet. App. 66a n.101. Although Judge Greene discoursed at some length, *id.* at 312-27; Pet. App. 29a-62a, on why he personally disagreed with DOJ's policy judgment and why he would not favor Bell Company entry into information services, he concluded that he could not deny relief under the applicable legal standard. Nonetheless, he *sua sponte* stayed his decision pending appeal. 767 F. Supp. at 332-33; Pet. App. 73a-75a.

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[4] This coalition included: Action for Children's Television; American Council for the Blind; Black Citizens for a Fair Media and the Council of Churches of the City of New York; Church Federation of Greater Chicago, Office of Communications; Citizens for a Sound Economy Foundation; Consumer Interest Research Institute; Consumer Research Foundation; Council of Chief State School Officers; the Media Institute; National Association for Better Broadcasting; National Association for the Advancement of Colored People; National Association of the Deaf; National Association of Silver Haired Legislators; National Indian Youth Council, Inc., and the Native American Broadcasting Consortium; National School Boards Association; National School Public Relations Association; Northeast Independent Living Program; Public Service Satellite Consortium; Telecommunications for the Deaf, Inc.; and World Institute on Disability, Inc.

E. Petitioners' Application for Stay

On motion of the United States and the Bell Companies, the Court of Appeals vacated the district court's stay as an "abuse of discretion" and held that none of the requirements for stay could be met. *United States v. Western Electric Co.*, 1991-92 Trade Cas. (CCH) ¶ 69,610, at 66,711 (D.C. Cir. Oct. 7, 1991) (*per curiam*).

Petitioners then sought a new stay in this Court on many of the same grounds as they now raise in their instant petition. In their stay application, they argued that the D.C. Circuit decision was in "square conflict" with the Second Circuit's decision in *American Cyanamid*. Application for Stay in A-91-267, at 21 (Oct. 15, 1991). As in their current petition, they insisted that this Court's intervention was "especially warranted" because the decree provision at issue "is a boilerplate provision the Department routinely includes in *every* antitrust decree." *Id.* at 16 (emphasis in original). They complained of confusion in the lower courts, referring to the same cases that they cite in their current petition. *Id.* at 23-24. The application for stay was referred to the entire Court and was unanimously denied. *American Newspaper Publishers Ass'n v. United States*, 112 S. Ct. 366 (1991).

Thus, since October of 1991, the Bell Companies have been competing vigorously in the information services market. Yet there is no evidence of any anticompetitive effects from this real-world experience.

F. The Second Appeal

On appeal of the merits, the D.C. Circuit unanimously affirmed the district court's judgment lifting the information services restriction. 993 F.2d 1572; Pet. App. 1a. Citing extensively to the leading cases regarding unopposed modifications, the Court of Appeals stressed that the deference due to the Department's policy judgment was not "abject" or "rubber-stamp," *id.* at 1576-77; Pet. App. 11a, 13a; in fact, the court explained that it was no greater than the "conventional"

deference to which agencies are entitled with respect to "expert, predictive judgments." *Id.* at 1577; Pet. App. 13a. The court added that this approach "accord[ed] with other courts' understanding of the court-agency relation under the Tunney Act." *Id.* at 1576; Pet. App. 12a.

In view of the fact-specific nature of the dispute in this case, the Court of Appeals spent twice as many pages analyzing the record evidence supporting the modification of the consent decree as it did discussing the appropriate legal test. The court determined that there was "an ample factual foundation for the judgment call made by the Department" and that any other conclusion would be "clearly erroneous." 993 F.2d at 1582; Pet. App. 23a. The Court of Appeals upheld the Department's determinations (1) that "there was no substantial risk that removal of the [information services] ban would lessen competition"; (2) "that under current conditions regulation would play a substantial role minimizing any anticompetitive risks"; and (3) "that removal of the ban would benefit consumers by enhancing competition in information services." *Id.* at 1578; Pet. App. 14a-15a. Indeed, the court determined that the factual showing supporting the Department's policy judgment was so overwhelming that it was unnecessary to define precisely what level of deference the district court had in fact applied. *Id.*; Pet. App. 14a.

Petitioners, primarily incumbents trying to foreclose new competition in the information services industry, did not seek rehearing in the D.C. Circuit. Instead, they directly petitioned this Court for review.

REASONS FOR DENYING THE WRIT

This case began in 1987. This is the third occasion on which petitioners have presented to this Court essentially the same arguments, in slightly different guises. This Court has already denied, unanimously and without comment, the 1990 petition seeking review of the *Triennial Review Opinion*; it has

already denied, unanimously and without comment, the 1991 stay application. As a result, the Bell Companies have been permitted to enter the information services market, investments have been made, and fundamental changes in the industry have occurred.

There is no reason for reversing course at this late date. The instant petition should receive the same disposition as the two prior proceedings before this Court, so that this case might finally come to an end.

I. THE DECISION BELOW IS FULLY CONSISTENT WITH LONGSTANDING JUDICIAL PRECEDENT

The Court of Appeals below erected no exceptional rule of deference to the policy judgment of the Department of Justice. Quite the contrary: the court explicitly disavowed any suggestion that a district court should manifest "abject deference" to the Department, or that a court should exhibit "total, rubber-stamp deference." 993 F.2d at 1576, 1577; Pet. App. 11a, 13a-14a. The Court of Appeals explained that it did not intend any "more deference than is conventional between court and agency on expert, predictive judgments." *Id.* at 1577; Pet. App. 13a. This statement of the law is correct, entirely unremarkable, and in fact consistent with the position taken by petitioners in this very case.[5]

Petitioners attempt to manufacture a certworthy question by caricaturing the court's holding[6] and by recycling their com-

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[5] Before the Court of Appeals, petitioners conceded that a reviewing court is required to give "special weight" to DOJ's views. Appellants' Brief 29 n.38. Before this Court, petitioners have previously acknowledged that "courts should give some deference" — even "great deference" — "to the views of the Department of Justice." Reply to Oppositions to Application for Stay in A-91-267, at 10 & n.17 (Oct. 24, 1991).

[6] The Court of Appeals criticized petitioners for trying to distort the meaning of its previous *Triennial Review Opinion* through

plaint, already twice rejected by this Court, of "confusion" and "conflict" in the lower courts regarding whether the Department of Justice's policy judgment is to be accorded deference in uncontested consent decree modifications. Pet. 20. The attempt at caricature is transparent, and the claim of "conflict" is no more persuasive the third time around.

There is no confusion or conflict in the lower courts. There is only an unbroken line of cases stemming from this Court's teaching that the Justice Department "must alone speak for the public interest" in antitrust matters. *See Buckeye Coal & Ry. Co. v. Hocking Valley Ry. Co.*, 269 U.S. 42, 48-49 (1925); *see also Swift & Co. v. United States*, 276 U.S. 311, 331-32 (1928) (the Attorney General's "authority to make determinations includes the power to make erroneous decisions as well as correct ones"); *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689 (1961) (it would be improper "to assess the wisdom of the Government's judgment in negotiating and accepting [a] consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting").

Consistent with these precedents, all lower courts to consider the question have ruled that the Department's policy judgment is entitled to deference in deciding whether a proposed modification is within the public interest. For example, in a leading case that the Court of Appeals noted both in the decision below, *see* 993 F.2d at 1576; Pet. App. 12a, and in the earlier *Triennial Review Opinion*, *see* 900 F.2d at 306, 307, 309; Pet. App. 114a-115a, 117a, 118a, 121a, the Ninth Circuit explained that "[w]e cannot agree that a district court should engage in an unrestricted evaluation of what relief would best serve the public. The balancing of competing social and political interests affected by a proposed antitrust decree

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"selective[]" quotation, 993 F.2d at 1576; Pet. App. 11a; ironically, petitioners now attempt the same strategy of distortion with respect to the very opinion that exposes their tactic.

must be left, in the first instance, to the discretion of the Attorney General." *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.) (emphasis added), *cert. denied*, 454 U.S. 1083 (1981). The Ninth Circuit added that a "court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "within the reaches of the public interest." *Id.* (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)).[7] As Professor Areeda

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[7] *See also, e.g., United States v. Yoder Brothers, Inc.*, 1989-2 Trade Cas. (CCH) ¶ 68,723, at 61,795 & n.5 (N.D. Ohio 1989) (applying proper "deference to the Justice Department's public interest determination" and explaining that a court "'may not substitute its opinion concerning . . . the determination of appropriate injunctive relief . . . absent proof of an abuse of discretion'") (citation omitted); *United States v. Columbia Artists Management, Inc.*, 1987-1 Trade Cas. (CCH) ¶ 67,600, at 60,601 (S.D.N.Y. 1987) (approving termination of consent decree because "the Department of Justice has offered a reasonable and persuasive explanation of why the termination of the judgment would serve the public interest in free and unfettered competition"); *United States v. National Finance Adjusters, Inc.*, 1985-2 Trade Cas. (CCH) ¶ 66,856, at 64,248 (E.D. Mich. 1985) ("the Justice Department has wide discretion in controlling government antitrust litigation, and this court should not second guess the wisdom of its acceptance of a consent decree or a modification thereof unless there is a claim of bad faith or malfeasance on the part of the government in so acting. . . . The court cannot say that the proposed modification is not in the public interest. . . . The Justice Department has made a reasoned determination that [modification of the decree would promote competition]. Since this determination has some support in economic theory and in the facts of this case, the court cannot say that the government has abused its discretion in deciding to [modify the decree.]"); *United States v. General Motors Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,614, at 69,093 (N.D. Ill. 1983) (according weight to the Government's views because "the Justice Department . . . continues to represent the people of the United States and can be trusted to at least in good faith, whether correctly or not, assert what it believes the public interest to be"); *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D.

has recognized, the public interest analysis that courts typically perform is quite limited and "even those courts exercising greater scrutiny stop far short of attempting to assess the competitive merits of one form of relief or another."[8]

In addition, the standard applied by the Court of Appeals is fully consistent with the common law test for unopposed modifications[9] and with the approaches of courts reviewing consent decrees in other contexts, such as environmental law.[10] The standard is also consistent with this Court's recent

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Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government . . . and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); *United States v. Louisiana-Pacific Corp.*, 1990-1 Trade Cas. (CCH) ¶ 69,077, at 63,945 (D. Oregon 1990) (reviewing FTC refusal to modify consent decree under arbitrary and capricious standard).

[8] 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 300g, at 145 (1978); *see also* Note, *Modifications of Antitrust Consent Decrees*, 84 Mich. L. Rev. 134, 144 (1985) ("The standard is extremely deferential to the Justice Department's determination of the public interest. . . . The cases do not . . . reflect an intense inquiry into the public interest").

[9] *E.g., United States v. CIBA Corp.*, 1970 Trade Cas. ¶ 73,319, at 89,262 (S.D.N.Y. 1970).

[10] Courts have stressed that the judicial function "is not to substitute [the court's] own judgment for that of the parties to the decree" and that courts have "only limited powers of review." *United States v. Hooker Chemical & Plastics Corp.*, 540 F. Supp. 1067, 1072 (W D.N.Y. 1982); *see also United States v. Cannons Engineering Corp.*, 720 F. Supp. 1027, 1036 (D. Mass. 1989) ("there is a presumption in favor of the settlement, particularly where 'a government agency committed to the protection of the public interest has participated in and endorsed the settlement'") (citations omitted); *In re Acushnet River & New Bedford Harbor*, 712 F. Supp. 1019, 1028 (D. Mass. 1989) ("the trial court 'should accord some substantial deference to [an] agency's determination that [a] settlement is appropriate'") (citation omitted); *City of New York v. Exxon Corp.*, 697 F. Supp. 677, 692 (S.D.N.Y. 1988) ("the court does not 'have the right or the duty to reach any ultimate conclusions on the issues of fact and law which

decisions emphasizing the need to afford the Government flexibility in securing decree modifications, even when the modification is sought by the restricted party over the original plaintiff's objection and even when the defendant proposing the modification has been found to have committed constitutional violations. *See Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 758, 760 (1992); *Board of Educ. v. Dowell*, 498 U.S. 237, 246-51 (1991). The situation here presents a far more compelling case for flexibility: no party to the decree opposes its modification, which is resisted primarily by industry incumbents representing their own parochial interests rather than the public interest, and the provision in question was never necessary to redress a violation of law, but was included in the decree only out of an excess of caution.[11]

Against this overwhelming authority, petitioners claim to have found a circuit conflict in the form of a single, supposedly inconsistent Second Circuit decision, *United States v. American Cyanamid Co.*, 719 F.2d 558 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984). That case was the centerpiece of both the unsuccessful prior petition for certiorari and the rejected stay application. *Cyanamid* is entirely consistent with the decision below, for there the Second Circuit held merely that a district court erred when it failed to apply a specific test (different from the public interest standard) that the parties had expressly agreed would govern the removal of a decree restriction. 719 F.2d at 565. Certainly, *Cyanamid* has not been interpreted to stand for the proposition that the Department's views are

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underlie the merits of the dispute'") (citation omitted).

[11] The information services restriction rested only on the parties' consent, now evaporated, and hence lacks the traditional foundation of a judicial remedial decree. *See Freeman v. Pitts*, 112 S. Ct. 1430, 1445 (1992) ("[i]n construing the remedial authority of the district courts, we have been guided by the principles that judicial powers may be exercised only on the basis of a [legal] violation, and that the nature of the violation determines the scope of the remedy") (internal quotation marks omitted).

entitled to no deference under the public interest standard. *E.g., United States v. Western Electric Co.*, 894 F.2d 430, 434 (D.C. Cir. 1990). Beyond this, the Second Circuit did not reject a policy judgment by DOJ but rather the Department's attempt to disavow *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), as the authoritative interpretation of the Clayton Act for vertical mergers. *See* 719 F.2d at 567. It is one thing to say, as the *Cyanamid* court did, that DOJ is bound to follow Supreme Court precedent; it is quite another to claim, as petitioners do, that the Department's inherently predictive and multi-factored balancing judgment in this case is entitled to no deference at all.[12]

Petitioners attempt to manufacture a question for this Court's review by asserting that this settled law "strips" district courts of their proper judicial authority. Nothing could be further from the truth. Under longstanding precedent regarding uncontested modifications, district courts retain an important factfinding role to ensure that the Government's views are rational, adequately explained, and not the product of malfeasance.[13] The Court of Appeals' exhaustive review of

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[12] Petitioners also claim to have found a conflict in *United States v. Jas. H. Matthews & Co.*, 1989 Trade Cas. (CCH) ¶ 68,441 (W.D. Pa. 1989), but that case conflicts only with petitioners' cartoon version of the Court of Appeals' decision. The *Matthews* court, "cognizant of the quasi-judicial nature of consent decrees and the 'occasional fallibility of the government,'" (quoting *United States v. Swift & Co.*, 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,703 (N.D. Ill. 1975), declared that it would not "rubberstamp the government's proposed termination." *Id.* at 60,434. Neither would the D.C. Circuit below. *See* 993 F.2d at 1577; Pet. App. 13a. Both courts made "the determination whether termination is in the public's interest," while "giv[ing] the government's position a degree of deference." *Matthews*, 1989 Trade Cas. at 60,434.

[13] As leading antitrust theorist Professor Milton Handler of Columbia University has explained: "To avoid being a rubber stamp, it is not necessary to conduct a hearing into the merits of the government's case, the soundness of the defenses, and the appropriateness of the judgment. There is a middle ground. The court is well-equipped

the facts of this case, *see* 993 F.2d at 1578-82; Pet. App. 14a-23a, demonstrates that the judicial role is hardly a supine one, and the court's analogy (*id.* at 1577; Pet. App. 12a) to the "arbitrary and capricious" test of administrative law — which, obviously, has often been used to overturn agency decisions, *e.g.*, *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983); *People of State of California v. FCC*, 905 F.2d 1217, 1238-39 (9th Cir. 1990) — shows that the test is not toothless. The Court of Appeals had in mind no "more deference than is conventional" for agencies to receive "on expert, predictive judgments." 993 F.2d at 1577; Pet. App. 13a. To say that a court's factfinding must be exercised with due regard for the expertise of the political branches is not to deny the court its proper function.

Indeed, in this case the parties to the decree recognized in 1982 that the information services restriction had anti-competitive potential and that it would be necessary to lift the restriction when DOJ determined it was appropriate to do so. A court reviewing an unopposed modification is asked not to decide a routine factual question but to assess whether the modified decree is in the "public interest" — a task which in the antitrust field involves making multi-faceted policy judgments based on market analysis, administrative experience,

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to probe with dispatch claims of bad faith, collusion, or malfeasance on the part of the Department; [and] to determine whether the decree requires the performance of illegal acts or gives shelter to unlawful conduct. . . . The court is entitled to inquire of the government whether any objections have been filed with the Department, what disposition has been made of them and to inform itself of the nature and scope of such objections. And, of course, it is entitled to a full statement by the parties of the background and purposes of the litigation and an explanation of the objects and provisions of the judgment. Once satisfied of the parties' good faith, a court has, in my opinion, no alternative but to accept both the government's judgment as to what the public interest demands and the compromise that the parties have wrought through their negotiations." 2 M. Handler, *Twenty-Five Years of Antitrust* 883-84 (1973) (footnotes omitted).

enforcement priorities, economic policy, and a complex balancing of competitive risks and benefits. Even if the ultimate inquiry is whether the modified decree will, on balance, prove to be procompetitive, such a "predictive judgment," 993 F.2d at 1577; Pet. App. 12a, is not a simple question of fact or even an application of law to fact.

Thus, in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978), this Court — in the course of upholding as "certainly not irrational" an FCC action taken pursuant to the "public interest" broadcasting test — explained that "to the extent that factual determinations were involved in the Commission's decision . . . they were primarily of a judgmental or predictive nature . . . . In such circumstances complete factual support in the record for the Commission's judgment or prediction is not possible or required; 'a forecast of the direction in which [the] future public interest lies necessarily involves deductions based on the expert knowledge of the agency.'" 436 U.S. at 813-14 (quoting *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961)); *see also Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983).[14]

Moreover, not only is DOJ best equipped to weigh the procompetitive benefits of Bell Company entry into the information services market against the necessarily speculative risks of anticompetitive conduct, and not only is DOJ the most accountable entity to make the requisite policy judgments involved, but DOJ is also the only decisionmaker that can view this particular case from the perspective of the Federal Government's overall antitrust enforcement strategy and can take into account the

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[14] Petitioners note that the Department of Justice acts as a prosecutor rather than merely as an administrative agency when it proposes a modification to a consent decree. Pet. 15. But petitioners fail to grasp that this does not decrease the deference to which the Department is entitled. DOJ is, after all, acting as the direct representative of the President fulfilling his constitutional duty to "[t]ake Care that the Laws be faithfully executed." Art. II, § 3.

appropriate allocation of necessarily finite administrative resources. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985); *Wayte v. United States*, 470 U.S. 598, 607 (1985).[15]

Accordingly, there is no need for this Court to revisit the already settled law regarding unopposed modifications. And this case would be a most inappropriate vehicle in which to do so. First, the Court of Appeals found that the factual showing supported the Department's policy judgment so overwhelmingly that it was unnecessary for the appellate court to determine precisely what legal test the district court had applied. *See* 993 F.2d at 1578; Pet. App. 14a. Any clarification of the Court of Appeals' decision is similarly unlikely to alter the result in this case.[16] Second, the information services restriction was included in the MFJ only out of an excess of caution; it was never necessary to remedy or prevent a legal violation. It should thus arguably be subject to an even more relaxed standard than the traditional "public interest" test.

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[15] In *Maryland v. United States*, 460 U.S 1001 (1983), this Court affirmed the district court's entry of the AT&T consent decree. The majority's decision rested on a narrow issue presented by the motions for summary affirmance. But three Justices explained, in an argument that the majority did not need to reach, that permitting courts to "re-decide an executive decision" or "to decide whether the Department of Justice has exercised its prosecutorial discretion to settle antitrust cases as well as it should," *id.* at 1004 (Rehnquist, now C.J., dissenting), would vest in a court the type of discretionary policy judgment that is properly reposed in the politically accountable branches.

[16] The personal views of the district judge to which petitioners accord so much weight, Pet. 14 n.22, are not legally cognizable findings. The court issued them based on its "own judgment," 767 F. Supp. at 327; Pet. App. 62a, of what government policy should be, knowing that they would have no operative legal significance because the court was required, notwithstanding those "findings," to grant the relief DOJ sought. Such "findings" are "purely academic" and have no legal force. *O'Neill v. United States*, 411 F.2d 139, 146 (3d Cir. 1969).

II. THE DECISION BELOW IS FULLY CONSISTENT WITH THE TUNNEY ACT

The Court of Appeals, after canvassing relevant precedent, determined that its approach "accord[ed] with other courts' understanding of the court-agency relation under the Tunney Act." 993 F.2d at 1576; Pet. App. 12a. Petitioners disagree, and renew their argument that the Act requires a court to engage in *de novo* factfinding to determine for itself "whether a consent decree is procompetitive." Pet. 13. Yet the Act itself does not even apply to modifications of consent decrees; the Act says nothing about *de novo* review and has never been interpreted by *any* court to require such review; and petitioners present no reason to change the Act's well-settled interpretation, particularly in light of the concerns raised by three Justices of this Court in *Maryland v. United States*, 460 U.S. at 1001-04 (Rehnquist, now C.J., dissenting). *See* note 15, *supra*.

By its terms, the Tunney Act governs only the initial "entry" of consent decrees rather than their modification and thus does not directly apply to this case. 15 U.S.C. § 16(e)(2). The Court of Appeals explained that the parties had "assumed" the Act's applicability, 993 F.2d at 1576; Pet. App. 10a;[17] yet, the issue could not be avoided if the Act were used to overturn the court's judgment.[18]

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[17] In the court below, the Bell Companies did not waive the issue of the Act's applicability. *See* Brief of Bell Company Appellees at 53 (filed Sept. 28, 1992).

[18] The very precedent on which petitioners place heavy reliance makes plain that the Tunney Act does not apply to modifications of consent decrees. *See American Cyanamid*, 719 F.2d at 565 n.7. In fact, only one court has applied the Tunney Act to a proposal to modify a consent decree. *See United States v. Motor Vehicles Manufacturers Ass'n*, 1981-2 Trade Cas. (CCH) ¶ 64,370 (C.D. Cal. 1981) (stating tersely that "the provisions of the Act are applicable here" and providing no reasoning for its conclusion).

Furthermore, nothing in the Tunney Act indicates that it was intended to alter the deferential common-law approach to judicial review of the *substance* of the Department of Justice's policy judgment. To be sure, the Act creates a variety of *procedures* to ensure that third parties are made aware of proposed consent judgments and permitted to comment on them; that the Department prepares a competitive impact statement summarizing critical aspects of the proposed decree; and that the Department considers and responds to public comments. 15 U.S.C. § 16(b), (c), (d). But, although the Act provides that the court should "determine whether entry of the decree is in the public interest," *id.* at § 16(e), the Act does *not* say that the court, in making this determination, is to substitute its own policy judgment for the Department's. Had Congress meant to depart so dramatically from the settled common-law approach, it surely would have explicitly established such a standard of review.[19] Thus, as the Court of Appeals below noted, "in *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508 (W.D. Mo. 1977), while the court spoke of making an 'independent public interest determination,' it also found that it was not 'to make a *de novo* determination of facts and issues,' and that its task was to determine whether the Department of Justice's explanations were 'reasonable under the circumstances.'" 993 F.2d at 1577 (citations omitted); Pet. App. 12a.

The decision below is also consistent with longstanding precedent construing the Tunney Act. In holding that the Act is satisfied so long as a proposed modification is within the "'reaches of the public interest,'" 993 F.2d at 1576; Pet. App.

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[19] *See* Note, *Judicial Review of Antitrust Consent Decrees: Reconciling Judicial Responsibility With Executive Discretion*, 35 Hastings L.J. 133, 151 n.143 (1983) ("[t]he Supreme Court pronouncements in *Swift & Co.* . . . and *Sam Fox Publishing* had been widely cited and followed by the lower courts. It is inconceivable that Congress was unaware of these pronouncements or that it intended for the courts to disregard the spirit of these two cases without even a hint of congressional disapproval of them.").

10a-11a, the court below quoted and followed the seminal Tunney Act case of *United States v. Gillette Co.*, 406 F. Supp. 713 (D. Mass. 1975). There, Judge Aldrich explained that the Government, not the court, was "settling the case" and that the Act required the court to perform only a limited review of the Executive Branch's decision to agree to the proposed consent order — to ensure that the Executive had acted in good faith, that parties with opposing views had been permitted to submit them, and that the government had made a "considered decision" to accept the consent decree. *Id.* at 715. Every other court interpreting the Tunney Act has followed *Gillette,*[20] and no court has ever accepted petitioners' proposed construction.

To make their argument, petitioners are forced to resort to piecing together snippets of legislative history. Petitioners seize on isolated phrases in floor statements and committee reports,[21] yet they ignore the bulk of the Act's history. The

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[20] *See also United States v. Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) ("The authority vested in this Court under the statute [the Tunney Act] is one of insuring that the Government has not breached its duty to the public in consenting to the Consent Decree. The Court is not required to determine whether the Decree is the one that will best serve society, but whether it is 'within the reaches of the public interest'"); *United States v. G. Heileman Brewing Co.*, 563 F. Supp. 642, 647 (D. Del. 1983) (repeating "reaches of the public interest" standard); *United States v. National Broadcasting Co., Inc.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *United States v. Associated Milk Producers, Inc.*, 394 F. Supp. 29, 45 (W.D. Mo. 1975); *United States v. Stroh Brewery Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,804, at 71,960 (D.D.C. 1982) (although under the Tunney Act "we are not sitting to 'rubber stamp' any proposed consent order, we will not substitute our judgment") (internal quotation omitted).

[21] Petitioners seize on one phrase in a lengthy Congressional Record statement by Senator Tunney: that courts are to exercise "an independent determination" in approving consent decrees. Pet. 16 n.26 (citing 119 Cong. Rec. 24597 (1973)). Of course, a court can — as the court below did — exercise independent judgment while still heeding the expertise of the Department of Justice. Moreover, in context it is clear that Sen. Tunney did not intend to create an unprecedented mechanism for district courts to review *de novo* the

House Report, for example, stressed Congress' "intention not to change case law construing the 'public interest' in cases involving the antitrust laws" and noted that "the phrase, 'public interest,' is a product of judicial construction." H.R. Rep. No. 1463, 93d Cong., 2d Sess. 11 (1974). "Preservation of antitrust precedent rather than innovation in the usage of the phrase, 'public interest,' is . . . unambiguous." *Id.; accord* S. Rep. No. 298, 93d Cong., 1st Sess. 3 (1973). Congress did not envision that district courts would conduct elaborate fact-finding missions in order to second-guess DOJ's determinations of the "public interest"; to the contrary, Congress recognized "the special expertise of the Attorney General in administering the antitrust laws." H.R. Rep. No. 1463, at 13. In short, even

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policy judgments of the Executive Branch. Rather, he aimed to codify and strengthen existing *procedures* for consent decree approval. He explained that "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24598 (1973). He added that the bill "would not compel a hearing or a trial on the public interest issues. It only asks that the trial judge elicit the needed information through the least complicated and least time consuming means. Where the public interest can be meaningfully evaluated merely on the basis of good briefs and careful oral arguments, then that is the approach which should be followed." *Id.* at 24598-99. Senator Tunney stressed that the bill's "provisions add nothing which could in any way stymie or frustrate the efforts of the Department of Justice in carrying out its duties in the antitrust area." *Id.*

Several in Congress spoke of *open procedures*, not substantive review, as the solution to the perceived problem of judicial "rubber stamping." *See, e.g.*, 120 Cong. Rec. 36342 (1974) (remarks of Rep. Seiberling) ("too often the courts have, in fact, simply rubber-stamped [consent] agreements. . . . This bill remedies that by requiring a 60-day period, at the start of which the proposal has to be made public, and during which time comments can be submitted by interested parties to the Department of Justice, which must submit to the court what those comments and the responses thereto are."); *id.* at 36343-44 (remarks of Rep. Jordan) (noting the bill's "purpose [is] to ventilate the consent decree process" and expressing hope that this would "correct[] judicial rubber-stamping.") (emphasis added).

if petitioners' resort to legislative history is appropriate, these materials defeat rather than support their argument.

III. THERE IS NO REASON TO REVIEW THE COURT OF APPEALS' 1990 INTERPRETATION OF THE AT&T DECREE

Petitioners also seek certiorari on the question whether the D.C. Circuit erred in 1990 in holding in the *Triennial Review Opinion* that the "public interest" standard of Section VII rather than the "no substantial possibility" standard of Section VIII(C) governs unopposed modifications of the MFJ. Their argument on this score is a near-verbatim recitation of the arguments that they raised in 1990, that respondents refuted, and that this Court declined to hear when it denied certiorari. Petitioners seek a second bite at the apple on the ground that *one* of the objections to their prior petition was that review in 1990 was unnecessary because the information services case would again be subject to review by this Court at a later date. *See* Pet. 22 n.38.

Yet there were other, more basic reasons that the 1990 petition — and hence the second question presented in the instant petition — did not present an issue worthy of review by this Court. The fundamental reason was that the *Triennial Review* decision was plainly correct. Section VIII(C) simply provides that line-of-business restrictions "shall be removed upon a showing by the petitioning BOC" of particular market facts. As the *Triennial Review* court observed, it "does not purport to be the *exclusive* standard for reviewing restrictions," 900 F.2d at 306; Pet. App. 115a, and its reference to "petitioning BOC" appeared to contemplate Bell Company motions for modification where relief was *contested* by a party. In the *Triennial Review* case, of course, the *Department of Justice* had also moved to eliminate the information services restriction. Further confirming the fact that Section VIII(C) had been inserted to govern only *contested* modifications, the Court of Appeals noted that "[t]he trial court expressly noted that the standard in Section VIII(C) would supplant '[t]he test

usually applied to a *contested* modification . . . [as] set forth in *United States v. Swift & Co.*, [286 U.S. 106 (1932)].'" 900 F.2d at 306 (Court of Appeals' emphasis) (citation omitted); Pet. App. 116a. The *Triennial Review* court concluded that there was "little question that the parties expected uncontested motions to be governed by common law principles pursuant to section VII," and that "[t]he addition of section VIII(C) cannot be viewed as altering this interpretation." *Id.*; Pet. App. 115a-116a. Tellingly, no party to the decree questioned the Court of Appeals' interpretation; only various nonparties, which had been granted limited intervenor status by the district court, quarreled with it.

Moreover, even apart from its merits, the *Triennial Review* decision raised no legal questions of general interest. It interpreted one consent decree using conventional tools of construction set out by this Court. The analysis is tightly fact-bound, turning heavily on the wording of one section of the decree, the particulars of the parties' May 1982 filings in the district court, and detailed examinations of the text and a footnote on a page of the district court's 1982 opinion. 900 F.2d at 305-07; Pet. App. 113a-117a. There is nothing to distinguish the *Triennial Review Opinion* from the run-of-the-mill case involving the construction of decree provisions.

Petitioners' complaints against the *Triennial Review Opinion* rest entirely on distortions. It is not, as petitioners contend, in tension with *United States v. Atlantic Refining Co.*, 360 U.S. 19 (1959), which established nothing about appellate deference to a district court's construction of a decree. The *Atlantic Refining* Court simply agreed on the record "with the trial court," rejecting the Government's "strained" textual argument in the face of its "long-standing acquiescence" in the interpretation favoring the defendant, and explaining that the purposes of the applicable statutes did not "warrant our substantially changing the terms of a decree to which the parties consented without any adjudication of the issues." 360 U.S. at 22-23. The portions of the opinion surrounding the snippet quoted by petitioners make clear that *Atlantic Refining*

articulates not a rule of appellate review but a rule of decree construction — one that denies the Government, long after validating a reasonable interpretation of the decree that the district court believes was embraced by both parties, the power suddenly to urge a contrary view based on what it claims was its *real* reason for entering into the decree. *See id.* at 23-24. This principle is not implicated here.

Nor is there any "circuit conflict" based on the *Triennial Review* Court's decision not to defer to the district court's interpretation of a consent decree whose meaning was already plain in light of its text and contemporaneous history. 900 F.2d at 294, 306-07; Pet. App. 89a, 114a-117a. Even the circuits cited by petitioners as being "in conflict" routinely employ *de novo* review on consent decree interpretation issues,[22] and the particular cases cited by petitioners (Pet. 26 n.42) are distinguishable because they concern situations (unlike here) where the language and history of a decree are not dispositive.[23] Finally, there is no merit to petitioners'

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[22] *See, e.g., United States v. City of Northlake*, 942 F.2d 1164, 1167 (7th Cir. 1991) (citing *Triennial Review Opinion* with approval); *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989) (making clear that under *Keith v. Volpe*, 784 F.2d 1457, 1461 (9th Cir. 1986) (cited by petitioners at Pet. 26), "[a] district court's interpretation of a consent judgment is a matter of law and freely reviewable on appeal"); *Stotts v. Memphis Fire Dept.*, 858 F.2d 289, 299 (6th Cir. 1988); *South v. Rowe*, 759 F.2d 610, 613 (7th Cir. 1985).

[23] In *AMF, Inc. v. Jewett*, 711 F.2d 1096, 1102 (1st Cir. 1983), the court cited "the usual considerations of contract interpretation" in *rejecting* a district court's view that decree provisions were "fatally ambiguous," although it stated that, "[i]n matters fairly open to debate, we have deferred to the conclusions of the district court." In *Ferrell v. Pierce*, 743 F.2d 454, 461 (7th Cir. 1984), there was no indication that anything turned on the court's apparent deference to the district court's view; in fact, the appellate court noted that "our primary goal must be to discern the intent of the parties as embodied in the agreement." In *Brown v. Neeb*, 644 F.2d 551, 558 & n.12 (6th Cir. 1981), the language of the decree was silent on the relevant issue. Indeed, it appears that the D.C. Circuit would consider extrinsic

suggestion that the *Triennial Review Opinion* is in conflict with prior practice under the MFJ.[24]

There was no reason to review the *Triennial Review Opinion* in 1990. There is even less reason to do so now, since the parties have operated for three years in reliance on the D.C. Circuit's interpretation of the MFJ, and since other decisions have incorporated into their analysis the difference between Section VII and Section VIII(C) originally set forth in the *Triennial Review Opinion*. *See, e.g., United States v. Western Electric Co.*, 969 F.2d 1231, 1232-33 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1363 (1993); *United States v. Western Electric Co.*, 907 F.2d 1205, 1209 (D.C. Cir. 1990). The interest in repose is great. Indeed, it is astonishing for petitioners to insist that the *Triennial Review Opinion* be discarded in the name of permitting "the *parties* [to] rely on the plain, intended, and settled meaning of decree provisions." Pet. 26 (emphasis added). The course sought by petitioners, none of whom was a party to the decree, and all of whom are merely limited intervenors in this case, works precisely against that end.

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evidence, including a district court's views, where the terms and history of a decree are not dispositive. *See United States v. Pollard*, 959 F.2d 1011, 1022-23 (D.C. Cir. 1992).

[24] Petitioners claim that, "in the years following entry of the decree, the [Bell Companies] filed well over 100 petitions . . . under Section VIII(C)." Pet. 24. In fact, early in the decree's history, the district court endorsed the parties' view of the Section VII public interest test by approving several waiver requests under it. *E.g., United States v. Western Electric Co.*, 569 F. Supp. 900, 1019 (D.D.C. 1983); *United States v. Western Electric Co.*, 578 F. Supp. 658, 660 (D.D.C. 1983). The Bell Companies continued to cite Section VII in subsequent requests, and this changed only when the district court decided for reasons of administrative convenience to require submission of all waiver requests to the Department of Justice for market analysis under the Section VIII(C) standard. *See United States v. Western Electric Co.*, 592 F. Supp. 846, 873-74 (D.D.C. 1984), *appeal dismissed*, 777 F.2d 23 (D.C. Cir. 1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 93-318

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CONSUMER FEDERATION OF AMERICA; MCI COMMUNICATIONS CORPORATION; NEWSPAPER ASSOCIATION OF AMERICA; INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA; ASSOCIATION OF DIRECTORY PUBLISHERS; COMMERCE CLEARING HOUSE, INC.; COX ENTERPRISES, INC.; DIALOG INFORMATION SERVICES, INC.; GE INFORMATION SERVICES; INFORMATION INDUSTRY ASSOCIATION; INTERNATIONAL COMMUNICATIONS ASSOCIATION; MCGRAW-HILL, INC.; MEAD DATA CENTRAL, INC.; NATIONAL ASSOCIATION OF BROADCASTERS; NATIONAL CABLE TELEVISION ASSOCIATION, INC.; PRODIGY SERVICES COMPANY; TOWARD UTILITY RATE NORMALIZATION; WEST PUBLISHING COMPANY; THE WISCONSIN CITIZENS' UTILITY BOARD, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA; AMERITECH; BELL ATLANTIC CORPORATION; BELLSOUTH CORPORATION; NYNEX CORPORATION; PACIFIC TELESIS GROUP; SOUTHWESTERN BELL CORPORATION; U S WEST, INC.; *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE UNITED STATES TELEPHONE ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

1. Does the Tunney Act requirement for district court approval of a consent decree that is in the "public interest" mandate the district court to second guess the Justice Department's evaluation of the public interest by conducting its own *de novo* factfinding?

2. Does the Second Circuit's holding in *American Cyanamid* pose any conflict that merits review of the D.C. Circuit's holding below regarding the role of a district court in evaluating an uncontested petition to modify a consent decree under the "public interest" standard?

3. Is the D.C. Circuit's holding that the decree parties did not intend for uncontested modifications to be reviewed by the district court under the Section VIII(C) standard so specific to this particular case that petitioners' complaint about this holding fails to present a question worthy of review?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No, 93-318

CONSUMER FEDERATION OF AMERICA; MCI COMMUNICATIONS CORPORATION; NEWSPAPER ASSOCIATION OF AMERICA; INFORMATION TECHNOLOGY ASSOCIATION OF AMERICA; ASSOCIATION OF DIRECTORY PUBLISHERS; COMMERCE CLEARING HOUSE, INC.; COX ENTERPRISES, INC.; DIALOG INFORMATION SERVICES, INC.; GE INFORMATION SERVICES; INFORMATION INDUSTRY ASSOCIATION; INTERNATIONAL COMMUNICATIONS ASSOCIATION; MCGRAW-HILL, INC.; MEAD DATA CENTRAL, INC.; NATIONAL ASSOCIATION OF BROADCASTERS; NATIONAL CABLE TELEVISION ASSOCIATION, INC.; PRODIGY SERVICES COMPANY; TOWARD UTILITY RATE NORMALIZATION; WEST PUBLISHING COMPANY; THE WISCONSIN CITIZENS' UTILITY BOARD, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA; AMERITECH; BELL ATLANTIC CORPORATION; BELLSOUTH CORPORATION; NYNEX CORPORATION; PACIFIC TELESIS GROUP; SOUTHWESTERN BELL CORPORATION; U S WEST, INC.; *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICUS CURIAE UNITED STATES TELEPHONE ASSOCIATION IN SUPPORT OF RESPONDENTS

SUMMARY

The petition asks the Court to become involved in a narrow dispute about the appropriate role of a U.S. district court in reviewing a request to remove a provision from the consent decree ending the AT&T antitrust litigation; the subject provision prohibited the respondent Regional Bell Operating Companies ("Bell Companies") from providing information services to consumers. No party to the decree had objected to removal of this provision.

Petitioners assume for purposes of their arguments 1 and 2 that the court below properly held that the district court is legally obligated under the Tunney Act [1] to eliminate the information services restriction if doing so is in the "public interest." But they contend in argument 1 that the Tunney Act's "public interest" standard requires the district court to make a *de novo* review of the record rather than perform the narrower factfinding role assigned by the court below. And they claim in argument 2 that there now is a serious conflict between two circuits—the Second Circuit and the D.C. Circuit—on the proper factfinding role of a district court in deciding whether to grant uncontested petitions to modify decrees.

In argument 3, petitioners contend that it was unlawful for the court below to require the district court to employ the "public interest" factfinding standard. They base this argument on their contention that when using established rules for interpreting decrees it is clear that parties to this particular decree intended the supposedly broader factfinding standard in Section VIII(C) of the subject decree to govern uncontested petitions for modification.

As shown below, none of petitioners' three arguments presents a basis for review of the decision below. With

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[1] The Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) (1988). This Act is named after its chief Congressional sponsor, Senator John Tunney.

regard to arguments 1 and 2, the limited role performed by the district court is consistent with the Tunney Act's "public interest" standard as construed by many lower federal courts, including the Second Circuit; indeed, constitutional principles of separation of powers mandate such a limited factfinding role. Argument 3 plainly does not present an issue worthy of review because the question it raises is specific to this particular decree, with *no* applicability *beyond* this particular case.

At bottom, this petition is a final, desperate act to stifle additional competition in the information services market and thus deny to consumers the benefits that such competition will bring. Petitioners view the district court judge charged with overseeing this particular decree as more sympathetic to their objectives, and they have concocted the legal theories presented in their petition as a last-ditch effort to get the case returned to that forum. However, experience now shows that eliminating the information services ban in order to permit Bell Company involvement in this market benefits competition in that market. Since the ban was lifted two years ago, Bell Companies have made numerous targeted investments in the information services market, and the market is robustly competitive.

INTEREST OF THE UNITED STATES TELEPHONE ASSOCIATION

The United States Telephone Association ("USTA") is the primary trade association of the local telephone industry.[2] Its membership consists of more than 1,000 telephone companies and includes the 22 telephone companies owned by the Bell Companies, which provide local telephone service to about 78 percent of the United States

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[2] Pursuant to Court Rule 37.2, USTA has provided the Clerk with letters from all parties giving USTA permission to file the present brief. *See* Revised Rules of the Supreme Court, Rule 37.2, *reprinted in* Court Rules, U.S.C.S., lawyers ed. (May 1993 supp.)

population. The remaining USTA members provide local telephone service to about 20 percent of the country's population living in more than 50 percent of its land area.

Throughout this proceeding, USTA has supported elimination of the information services ban from the subject decree. It has filed briefs at every step of the proceeding.[3]

USTA has supported removal of the information services ban even though such removal would give Bell Companies the right to provide information services to the roughly 50 million people served by USTA's non-Bell Company members. USTA has done so for three reasons. *First*, eliminating the ban will promote more rapid introduction of information services throughout the United States, a result that will benefit all consumers, including the customers of USTA's non-Bell Company members.[4] *Second*, removing the ban will promote modernization and enhancement of the telephone network infrastructure of hundreds of USTA member telephone companies hav-

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[3] *See* "Comments of U.S. Teleph. Ass'n", *U.S. v. West. Elec. Co.*, 673 F. Supp. 525 (D.D.C., filed Mar. 13, 1987) (urging elimination of the information services ban); "Brief for Intervenor U.S. Teleph. Ass'n", *U.S. v. West. Elec. Co.*, 900 F.2d 283 (D.C. Cir., filed May 8, 1989) (urging reversal of district court order reported at 673 F. Supp. 525 declining to grant uncontested petitions to eliminate the ban); "Comments of U.S. Teleph. Ass'n in Support of Joint Mot. of Bell Op. Companies to Delete the Info. Services Ban in Sec. II(D)(1) of AT&T Consent Decree", *U.S. v. West. Elec. Co.*, 767 F. Supp. 308 (D.D.C., filed Aug. 22, 1990) (supporting elimination of the ban pursuant to court of appeals order reported at 900 F.2d 283 remanding case to district court for consideration of petition under "public interest" standard); "Brief of Amicus Curiae U.S. Teleph. Ass'n", *U.S. v. West. Elec. Co.*, 993 F.2d 1572 (D.C. Cir., filed Aug. 31, 1992) (supporting district court post-remand order reported at 767 F. Supp. 308 eliminating ban under "public interest" standard).

[4] *See, e.g.*, "Comments of U.S. Teleph. Ass'n in Support of Joint Mot. of Bell Op. Companies to Delete the Info. Services Ban in Sec. II(D)(1) of AT&T Consent Decree," *supra*, at 5.

ing no affiliation with a Bell Company.[5] *Third,* eliminating the ban will help ensure the rapid availability of numerous technical improvements to regular telephone service offered by hundreds of USTA member telephone companies who are unaffiliated with a Bell Company.[6]

BRIEF HISTORY OF THE CASE

On August 24, 1982, during the trial of the government's antitrust action against AT&T, the district court entered a consent decree. Section II(D) of the decree prohibited the Bell Companies from engaging in certain lines of business, including the provision of information services. *United States v. Western Elec. Co.,* 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States,* 460 U.S. 1001 (1983).

In 1987, the Department of Justice and the Bell Companies petitioned the district court to eliminate the information services ban from the decree. The only other party to the decree, AT&T, did not oppose these petitions.[7]

Notwithstanding the consent of all parties to the decree, the district court refused to eliminate the information service ban on the ground that the Bell Companies had not met their burden of proof under Section VIII(C) of the decree. *United States v. Western Elec. Co.,* 673 F. Supp. 525, 532-35 (D.D.C. 1987). That provision requires a petitioning Bell Company to show that "there is no substantial possibility that it could use its monopoly power to impede competition in the market it seeks to enter." *United States v. Western Elec. Co., supra,* 552 F. Supp. at 231.

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[5] *Id.* at 6.

[6] *Id.* at 6-7. USTA also has supported eliminating the ban on grounds that it unconstitutionally infringes the Bell Companies' First Amendment speech rights.

[7] A provision in the decree that had barred AT&T from providing certain types of information services was eliminated by the district court more than four years ago. *U.S. v. West. Elec. Co.,* 1989-2 Trade Cas. (CCH) ¶ 68,673 (D.D.C. 1989).

On appeal, the D.C. Circuit Court of Appeals rejected use of the Section VIII(C) test and directed the district court on remand to review the uncontested modification petition under the less demanding "public interest" standard. *United States v. Western Elec. Co.*, 900 F.2d 283, 306-07 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 283 (1990). Under that standard, the district court must approve a proposed decree "so long as the resulting array of rights and obligations is within the *zone of settlements* consonant with the public interest *today*." *Id.* at 307 (emphasis in original). This is the well-established standard that district courts use to evaluate uncontested petitions involving consent decrees in the absence of a finding that the parties' clear intent was to the contrary.[8]

In rejecting use of the Section VIII(C) test, the appeals court relied on conventional tools for interpreting consent decrees established by this Court in cases like *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975); *United States v. Armour & Co.*, 402 U.S. 673 (1971); and *United States v. Atlantic Refining Co.*, 360 U.S. 19 (1959). Applying these tools, the court held that the parties to this particular decree had intended that the Section VIII(C) test would be used *only* to resolve petitions for decree modification that are *contested* by one or more decree parties and that they had intended the district court to review *uncontested* petitions under the "public interest" standard.

On remand, the district court granted the petition (albeit reluctantly) to lift the information services ban, finding that the "public interest" standard had been met. *United States v. Western Elec. Co.*, 767 F. Supp. 308, 329 n.101 (D.D.C. 1991). The court rendered its decision after permitting oral argument and after accepting written evidence of impact on the public interest that had been submitted in the remand proceeding by parties and

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[8] *See* Argument 1, *infra*.

by a broad range of intervenors and amici, including USTA.

On appeal, the D.C. Circuit Court of Appeals upheld the district court order eliminating the ban, flatly rejecting the petitioners' argument that the Tunney Act's "public interest" standard requires a district court to make an independent evaluation of the public interest. Instead, the appeals court restated its earlier holding limiting the district court to determining whether the decree parties' unanimous evaluation of the public interest is within the zone of settlements consonant with the public interest. *United States v. Western Elec. Co.*, 993 F.2d 1572, 1576 (D.C. Cir. 1983). It explained that an uncontested modification proposal which the parties "reasonably regarded as advancing the public interest" meets this standard (*id.*), and it noted that a district court may reject an uncontested modification under this standard "only if it has exceptional confidence that adverse anticompetitive consequences will result . . . ." *Id.* at 1577. The appeals court held that the record compiled in the district court provided "an ample factual foundation" to support a finding that eliminating the ban is within the zone of settlements consonant with the public interest. *Id.* at 1582.[9] And it noted that the support of USTA and the Computer and Communications Industry Association ("CCIA") for eliminating the ban "is something of a vindication" of this holding, since USTA and CCIA members could be hurt if any Bell Company were to compete unfairly in the information services market. *Id.*

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[9] Indeed, the appeals court held that the record was sufficiently strong that the district's court's ruling would have been "clearly erroneous" if it had found that eliminating the ban is *not* within this zone. *Id.* at 1578.

ARGUMENT

I. THE TUNNEY ACT REQUIREMENT TO APPROVE A CONSENT DECREE THAT IS IN THE PUBLIC INTEREST DOES *NOT* MANDATE SECOND GUESSING OF THE JUSTICE DEPARTMENT'S OWN EVALUATION OF THE PUBLIC INTEREST THROUGH DE NOVO FACTFINDING

As their lead argument, petitioners assert that the appeals court assigned a factfinding role to the district court when deciding whether an uncontested modification to a consent decree is in the public interest that is proscribed by the Tunney Act. Whereas the appeals court limited the district court's review of the "public interest" to a determination of whether an uncontested decree modification is within "the zone of settlements consonant with the public interest today," petitioners assert that the Tunney Act permits uncontested modifications *only* after the district court makes a public interest determination based on its own *de novo* review of all relevant public interest factors. Pet. at 12-17.

The petition should not be granted on the basis of this argument by the petitioners because the argument—quite simply—is wrong. Not only do petitioners fail to cite a single case in which any court has held that the Tunney Act requires district courts to engage in *de novo* factfinding under the "public interest" standard, they also ignore numerous cases in which the *de novo* factfinding they advocate has been rejected. *See, e.g., United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981) ("The court's role [in deciding whether to approve a consent decree] is one of insuring that the government has not breached its duty to the public in consenting to the decree [by determining] whether the settlement 'is within the reaches of the public interest' ") (citations omitted); *United States v. Yoder Bros., Inc.*, 1989-2 Trade Cas. (CCH) ¶ 68,723 at 61,795 &

n.5 (N.D. Ohio 1986) ("Absent a showing of corrupt failure of the government to discharge its duty, the [District] Court, in making its public interest finding, should . . . carefully consider the explanations of the government . . . and its responses to comments in order to determine whether those explanations are reasonable under the circumstances") (quoting *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508 at 71,980 (W.D. Mo. 1977) (ellipses in original)); *United States v. Stroh Brewery Co.*, 1982-2 Trade Cas. (CCH) ¶ 64,804 at 71,960 (D.D.C. 1982) ("although [under the Tunney Act] we are not sitting to 'rubber stamp' any proposed consent order, we will not substitute our judgment") (internal quotation omitted); *United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975) (district court's proper role is to ensure that the Department of Justice acted in good faith, to give parties with opposing views an opportunity to submit those views, and to determine that the government has made a "considered decision" to accept the decree).[10] Indeed, then-Justice Rehnquist's dissent in *Maryland v. United States*, 460 U.S. 1001, 1004-06 (1983), explained that if the Tunney Act's "public interest" test were construed to require courts to re-decide a decision by the Department of Justice, a serious Constitutional issue would be raised under fundamental separation-of-powers principles by vesting in a court the type of discretionary policy judgment that properly resides in the executive branch.[11]

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[10] *See also* 2 M. Handler, *Twenty-Five Years of Antitrust*, 883-84 (1973) (footnotes omitted):

> Once satisfied of the parties' good faith, a court has, in my opinion, no alternative but to accept both the government's judgment as to what the public interest demands and the compromise that the parties have wrought through their negotiations.

[11] Although petitioners seek to avoid the separation of powers problem noted by then-Justice Rehnquist by asserting that the

Lacking judicial support for the *de novo* factfinding role which they claim the Tunney Act requires district courts to perform under the "public interest" standard, petitioners assert that the Act's plain language and its legislative history support a requirement for such *de novo* factfinding. Pet. at 12-13, 16. Thus, they state that the Tunney Act's requirement that "the *court* shall determine that the . . . judgment is in the public interest" (emphasis added) proves that the Act itself requires *de novo* factfinding by the district court. Pet. at 12. They quote two snippets from the Tunney Act's legislative history—that the Act was intended to end judicial "rubber stamping" and that the Act requires "independent judgment"—to bolster their assertion that the Act mandates *de novo* district court factfinding. Pet. at 15. And they contend that Congress would have stated explicitly that the Act gives district courts limited factfinding power if that is what Congress intended. Pet. at 15.

Petitioners read far too much into the Tunney Act words that the "*court* shall determine" (emphasis added) that the proposed decree is in the public interest since this requirement says *nothing* about the *nature* of the role the court must perform in *making* that determination. The bits of legislative history to which they refer do not help their case for the same reason.

"public interest" inquiry here "involves a [specific] factual inquiry into the effect of the proposed[ed decree] on competition" rather than some more ambiguous factual inquiry (Pet. at 17 n.28), this does *not* avoid the problem. In his dissent, Justice Rehnquist stated that *any* attempt by a court to eliminate a separation of powers issue by defining "public interest" narrowly would fail:

> It is not clear to me that . . . *any* [] standard [for determining whether a consent decree is in the public interest that] the District Court could have devised, admits of resolution by a court exercising the judicial power established by Art. III of the Constitution. 460 U.S. at 1004 (emphasis added).

In fact, the legislative history shows plainly that Congress intended the district court's factfinding role under the Tunney Act's "public interest" standard to be limited in the manner required by the court below. For example, the House Report explained that the Tunney Act would "not . . . change case law construing the 'public interest' in cases involving the antitrust laws . . . ." H.R. Rep. No. 1463, 93d Cong., 2d Sess. 11 (1974); *accord* S. Rep. No. 298, 93d Cong., 1st Sess. 3 (1973). That case law could not have been more clear: in determining whether an antitrust consent decree is in the public interest, this Court had ruled unambiguously that "sound policy would strongly lead us to decline [an] invitation to assess the wisdom of the Government's judgment in negotiating and accepting [a] consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting." *Sam Fox Publishing Co. v. United States*, 366 U.S. 683, 689 (1961); *see also Swift & Co. v. United States*, 276 U.S. 311 (1928).

Finally, the fact that Congress did not state explicitly in the Tunney Act that the Act's "public interest" standard gives district courts only a limited factfinding role does *not* create an inference that Congress intended an *expansive* role. To the contrary, the common law principle of limited district court factfinding power in considering consent decree settlements was so well established at the time the Tunney Act was passed that Congress explicitly would have established *de novo* factfinding power for district courts if that is what it had intended to do.[12]

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[12] *See* Note, *Judicial Review of Antitrust Consent Decrees: Reconciling Judicial Responsibility with Executive Discretion*, 35 Hastings L.J. 133, 151 n.143 (1983) ("[t]he Supreme Court pronouncements in *Swift & Co.* . . . and *Sam Fox Publishing* had been widely cited and followed by the lower courts. It is inconceivable that Congress was unaware of these pronouncements or that it intended for the courts to disregard the spirit of these two cases without even a hint of Congressional disapproval of them").

A review of the circumstances under which the information services ban was included in the decree demonstrates plainly that it would be a perverse injustice if the Tunney Act's "public interest" standard somehow was held to require *de novo* district court factfinding in this case. In entering this decree pursuant to the Tunney Act, the district court held that the proposed line of business restrictions to which the decree parties had agreed, including the information services ban, were *permissible,* but not *mandatory,* to protect the public interest. *See, e.g.,* 552 F. Supp. at 161, where the court held that "[i]t would be inappropriate for the Court at this juncture to draw definitive conclusions with regard . . . to the sufficiency of the evidence to sustain a finding of liability . . . . The Court is not called upon, in this public interest proceeding to render a final judgment on this case . . . ." *See also* 900 F.2d at 307. It would be unjust to conclude that a provision the district court found *permissible* but not mandatory under the Tunney Act's "public interest" standard when the decree was entered could now be mandatory in the absence of a finding by the same district court that the ban no longer helps achieve the public interest.

II. THE SECOND CIRCUIT'S HOLDING IN *AMERICAN CYANAMID* DOES NOT CONFLICT WITH THE HOLDING BELOW REGARDING THE ROLE OF A DISTRICT COURT IN EVALUATING AN UNCONTESTED PETITION TO MODIFY A CONSENT DECREE UNDER THE "PUBLIC INTEREST" STANDARD

Petitioners next urge that their petition be granted on the ground that the district court's role in the D.C. Circuit for evaluating consent decrees under the "public interest" standard conflicts with the district court's role in the Second Circuit. Pet. at 18-22. According to petitioners, whereas the D.C. Circuit requires the district court to defer to the Justice Department's public interest

evaluation, the Second Circuit, in *United States v. American Cyanamid Co.*, 719 F.2d 558 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984), requires the district court to make a *de novo* evaluation of the public interest. Pet. at 18.

There is *no* conflict between the circuits on this point. Contrary to the petitioners' contention, *Cynamid* does *not* dictate a district court's role under the "public interest" standard in the Second Circuit. While petitioners are correct that the Second Circuit held in *Cyanamid* that the district court in *that particular case* must make an independent evaluation of whether to vacate the decree as the uncontested petition had requested, the court's ruling was based upon its conclusion that the parties had *intended* to give the court this special factfinding role in deciding petitions to vacate the decree (including an uncontested petition), and that this intent was reflected in Section XI of the decree itself. That provision expressly conditioned vacation of the decree on a showing *"to the satisfaction of* [*the decree c*]*ourt* that the effect . . . will not be substantially to lessen competition . . . ." 719 F.2d at 564 (emphasis added). Moreover, the Second Circuit in *Cyanamid* did not reject a policy judgment by the Department of Justice as petitioners desire here; instead, it rejected the Justice Department's attempt to disavow *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), as the authoritative interpretation of the Clayton Act for vertical mergers. 719 F.2d at 567. Thus, *Cyanamid* stands for the traditional view of a court's duty to interpret and enforce the law whereas, by seeking to apply the *Cyanamid* standard in the present case, petitioners ask that the standard be applied in reviewing executive branch policy judgments.

III. PETITIONERS' CRITICISM OF THE D.C. CIRCUIT'S HOLDING THAT THE PARTIES TO THIS DECREE DID NOT INTEND UNCONTESTED MODIFICATIONS TO BE REVIEWED UNDER DECREE SECTION VIII(C) FAILS TO PRESENT A QUESTION WORTHY OF REVIEW BECAUSE IT RAISES AN ISSUE THAT IS RELEVANT ONLY TO THE FACTS OF THIS PARTICULAR CASE

Finally, petitioners ask the Court to review this case in order to determine whether the parties to this decree intended that the district court undertake the factfinding role contemplated by Section VIII(C) of the decree rather than the role contemplated under the "public interest" standard as the appeals court found. Petitioners' view is that the parties intended that the district court perform the factfinding function contemplated in Section VIII(C) in deciding *all* decree modification petitions, and they claim that this view is supported by the "normal meaning" of Section VIII(C), "six years of history" in administering the decree, and the district court's interpretation of the decree—all of which are to be considered under rules of construction laid down in *Atlantic Refining Co.*, 360 U.S. 19 (1959). Pet. at 22-25.

Even if the petitioners had raised a question of whether the appeals court wrongly held that the parties did not intend Section VIII(C) to establish the district court's role in deciding uncontested modification petitions, this holding was so specific to this particular decree that it plainly does not merit review. There is absolutely nothing to distinguish the opinion below from any other case in which participants dispute the meaning of a provision in a decree, a court applies traditional rules of construction to determine the meaning, and some participants persist in insisting that rules of construction were misapplied to the facts of the subject decree.

In fact, the petitioners have not called into question the court's ruling on this issue because the court plainly did *not* come to a faulty conclusion in applying traditional

rules of construction for interpreting provisions of consent decrees. First, petitioners have not shown that as a matter of law the "normal meaning" of Section VIII(C)'s language requires the district court to apply that provision to uncontested petitions. Indeed, they ignore the fact that *all parties* to the decree informed the district court in 1982 that their intent was that uncontested petitions would be reviewed under the "public interest" test rather than under Section VIII(C). 900 F.2d at 306 (quoting 1982 brief of the United States and citing 1982 AT&T brief to the same effect).

Second, although petitioners are correct that the district court had analyzed several previous uncontested petitions to modify this decree under Section VIII(C), this does not prove that the appeals court ignored "six years of history" when it ruled that such petitions should be evaluated by the district court under the traditional "public interest" standard. This is because, until the present case, the district court routinely had granted uncontested petitions for modification under the Section VIII(C) standard, thus leaving decree parties with little incentive to appeal. In addition, just as the district court previously had analyzed some undisputed petitions under Section VIII(C), it had analyzed *others* under the "public interest" standard. *See, e.g., United States v. Western Elec. Co.*, 578 F. Supp. 658, 660 (D.D.C. 1983); *United States v. Western Elec. Co.*, Civil No. 82-0192, slip. op. at 10 (D.D.C., Feb. 6, 1984).

Finally, it is not true that the court below failed "to give any deference" to the district court's view that Section VIII(C) defines the appropriate factfinding role for the district court in uncontested modification proceedings. The opinion of the appeals court states on its face that the court took careful account of the district court's contemporaneous interpretation of the circumstances under which Section VIII(C) would be used. 900 F.2d at 294 n.10. Although petitioners cite several cases in which

other appeals courts have affirmed a district court's view of a consent decree based in part on the district court's own statement of its view, none of these cases holds that a district court's view must be accepted as a matter of law by an appeals court if the appeals court finds, after applying other rules of construction, that the district court's interpretation was erroneous. Indeed, other appeals courts have overturned district court decree interpretations when they concluded that those interpretations were wrong. *See, e.g., AMF, Inc. v. Jewett,* 711 F.2d 1096, 1102 (1st Cir. 1983); *United States v. Chicago Board of Education,* 717 F.2d 378, 382 (7th Cir. 1983).

CONCLUSION

The petition for writ of certiorari should be denied.

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Supreme Court of the United States
OCTOBER TERM, 1993

CONSUMER FEDERATION OF AMERICA, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RULE 29.1 STATEMENT

Petitioners incorporate by reference the Rule 29.1 statement set forth in the Petition for Certiorari at ii-vii.

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The United States concedes that this case presents the question "whether it is the role of the Department of Justice or the court" to decide if modification of a consent decree will be procompetitive. U.S. Opp. 10 n.7. The United States also concedes that the D.C. Circuit's ruling "assigns that role to the Department" by requiring courts to enter modifications they find anticompetitive so long as DOJ's position has a "reasonable basis." U.S. Opp. 10 n.7. Thus, despite the rhetoric of the Bell Operating Company ("BOC") respondents, there is no dispute that this case squarely presents the allocation-of-powers question identified in the petition for certiorari.

Nor is there any serious dispute as to the importance of that question.[1] The standard adopted below would control both the modification and the initial entry of antitrust consent decrees, U.S. Opp. 6-7, and encompass *all decrees* to which the government is a party, including environmental and civil rights decrees. *See* Petition for Certiorari, at 21 ("Pet."); BOC Opp. 14. Respondents have offered no good reason why the Court should decline to clarify the proper role of district courts in exercising these important and recurring responsibilities.[2]

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[1] Indeed, the Court has granted review to resolve the related question of a court's role in considering consensual motions to vacate a judgment. *Izumi Seimitsu Kogyo Kabushike Kaisha v. U.S. Philips Corp.*, No. 92-1123 (S. Ct. argued Oct. 12, 1993). The United States' *amicus* brief in *Izumi* recognizes the relationship between the court's role in that context and its role in considering consent decree proposals. Brief for the U.S. as *Amicus Curiae* Supporting Respondents, at 27 (filed May 25, 1993).

[2] The BOCs—but not the United States—have misrepresented the prior petition for certiorari in this case by suggesting that it raised the allocation-of-powers question presented here. BOC Opp. 6, 10. The *only* issue raised in the petition for review of the D.C. Circuit's 1990 ruling was one of decree interpretation—the court's refusal to apply the standard for modification contained in the decree. Petition for a Writ of Certiorari, *MCI Communications Corp. v. United States* (No. 90-9, filed June 28, 1990). Nor did the application to stay the district court's decision on remand concern the circuit

1. Because the question presented is so plainly important, respondents devote most of their energy to attempting to rationalize the D.C. Circuit's dubious result. They fail, however, to come to grips with Congress's clear answer to the question whether "it is the role of the Department of Justice or the court" to determine the competitive impact of a decree proposal. Nothing in the text of the Tunney Act entrusts the public interest determination to DOJ or sets forth a "reasonable basis," "arbitrary and capricious," or "substantial evidence" standard of review, or any other standard limiting a court's ability to weigh evidence and find facts independently. To the contrary, the Act provides that "the *court shall determine* that the entry of such judgment is in the public interest." 15 U.S.C. § 16(e); App. 127a (emphasis added).[3]

That the Tunney Act vests district courts with discretion regarding the *procedures* needed to review decree proposals (BOC Opp. 21-23 & n.21) confirms rather than contradicts the Act's requirement of an independent judicial role in making findings of fact necessary to the public interest determination. Although the Tunney Act does not *require* courts to "engage in elaborate fact-finding missions" (BOC Opp. 23), the Act explicitly *authorizes* courts to take extensive lay and expert evidence, including evidence from intervenors. 15 U.S.C. § 16(f); App. 128a. Thus, the text of the Act supports a district court's authority to find facts on competitive impact. To prohibit a

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court's "reasonable basis" standard, which had not yet been formulated.

[3] The BOCs' reliance on *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) (BOC Opp. 18), undermines their position because in that case Congress had specifically delegated to the FCC the duty to make a public interest determination, and expressly subjected that judgment to *limited* judicial review under the APA. 436 U.S. at 810 ("the weighing of policies under the 'public interest' standard is a task that Congress has delegated to the Commission in the first instance"); *id.* at 793, 795, 803; 47 U.S.C. §§ 307, 402(a); 28 U.S.C. § 2342(1); 5 U.S.C. § 706(2)(A). *See also United States v. Ottati & Goss, Inc.*, 900 F.2d 429, 434 (1st Cir. 1990), *cited in* Pet. 16 n.25.

district court from weighing and resolving conflicts in the evidence Congress authorized it to elicit—as the decision below does—is flatly inconsistent with the Act.

Respondents' argument that the Tunney Act does not explicitly apply to decree modifications (BOC Opp. 20; U.S. Opp. 8 n.5) is a red herring because the United States concedes that "uncontested modifications should be approved so long as the modifications satisfy the public interest standard embodied in the Tunney Act," U.S. Opp. 8 n.5 (citations and internal quotations omitted), and the court of appeals applied that standard. 993 F.2d at 1576; App. 10a; 900 F.2d at 295; App. 91a.[4] Thus, whether the public interest inquiry is considered a direct application of the Tunney Act, or a common law approach incorporating the "Tunney Act standard," the question presented here must be resolved.[5]

2. The BOCs defend the D.C. Circuit's "reasonable basis" standard as necessary to prevent judicial interference with executive "policy" judgments. BOC Opp. 1,

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[4] Moreover, numerous courts considering requests to modify decrees purport to apply the Tunney Act "standard" and procedures without explicitly reaching the issue of the statute's application. *See, e.g., United States v. Columbia Artists Mgmt.*, 662 F. Supp. 865, 869 (S.D.N.Y. 1987) (Tunney Act public interest "standard" applies to uncontested proposal for termination of consent decree); *United States v. General Elec. Co.*, 1977-2 Trade Cas. ¶ 61,659 (E.D. Pa. 1977) (court applies Tunney Act procedures in making public interest determination). Indeed, in the original "Modified" Final Judgment proceedings in this case, the district court's public interest findings under the Tunney Act were challenged on direct appeal to this Court, and summarily affirmed. *Maryland v. United States*, 460 U.S. 1001 (1983). Chief Justice Rehnquist's dissenting opinion questioned the constitutionality of the Tunney Act, but not its application to the MFJ. 460 U.S. at 1003-06.

[5] Only if the "standard" contained in the Tunney Act is somehow different from the Tunney Act itself—a metaphysical distinction no respondent attempts to support—would this Court need to reach the subsidiary question whether the Tunney Act applies to decree modifications. That question has never been resolved by this Court, and, as noted above, *supra* n.4, has been avoided by the lower courts.

10, 12, 17-18. But DOJ makes no such claim of executive prerogative on its own behalf. The United States recognizes that the D.C. Circuit's ruling requires deference to DOJ *on the question of competitive impact,* not on "policy" issues. U.S. Opp. 10 n.7; 993 F.2d 1577; App. 11a-12a; 900 F.2d at 308, 309; App. 119a-121a.[6] The threshold determination of anticompetitive effect is not a "policy" issue committed to the executive.[7]

The United States offers a different rationale for restricting district courts to reasonable-basis review. It contends this restriction is appropriate because competitive impact is a "predictive" judgment. U.S. Opp. 9-10 n.7. Courts, however, routinely make "predictive judgments" about likely competitive impact in contested antitrust cases, whether or not the government is a party. These "predictive judgments" are always treated as findings of fact subject to clearly erroneous review, and no deference is paid to the government's or any other party's "prediction." *See* Pet. 17 n.28.[8] Courts do not lose their

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[6] Thus, this case does not involve "the appropriate allocation of necessarily finite administrative resources" (BOC Opp. 18-19), "political or social judgments," or legislative policy (BOC Opp. 1). *United States v. Bechtel Corp.*, 648 F.2d 660 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981), is not to the contrary. In *Bechtel* the court merely held that deference was owed DOJ on *social and political* issues. 648 F.2d at 666. The policy issue in *Bechtel* was the relationship between a consent decree, the Arab boycott of Israel, and a newly enacted statute regarding foreign boycotts.

[7] Petitioners do not claim that the decision below requires "abject deference" to DOJ's views. *See* BOC Opp. 2, 9, 11. The decision requires deference whenever DOJ's views are reasonable and have substantial factual support. That degree of deference, instead of independent judicial resolution of disputed facts, is not "abject" but is inappropriate and inconsistent with the common law and Tunney Act public interest test.

[8] In addition, district courts routinely determine the likely harm to litigants and the public stemming from the denial or issuance of an injunction, the likely effect of proposed remedies in institutional reform litigation, the potential danger to society if a criminal defendant is released pending trial, the "future dangerousness" of a convicted criminal in proceedings to determine if the death penalty

competence to determine competitive impact when the government settles a case.

The BOCs further argue that deference is owed to DOJ because the information services restriction is in the decree only as a result of the parties' consent, which has now been withdrawn. BOC Opp. 5, 15 n.11. But *every* provision in the decree required the parties' initial consent. The controlling fact under the common law and the Tunney Act is not that the parties reached an agreement, but that they chose to seek judicial adoption of that agreement.[9] Judicial orders, unlike private agreements, must be consistent with the public interest. *See* Pet. 21 & nn.34, 35. An order to lift a restriction found necessary to protect competition is no different.[10] Although the parties' decision to compromise is entitled to

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should be imposed, or the likely "chilling effect" of a law or regulation challenged on first amendment grounds, to name just a few examples. In none of these cases is a court bound to accept any reasonably supported government prediction.

[9] *See, e.g., United States v. Swift & Co.*, 286 U.S. 106, 117 (1932) (defendants "chose to consent, and the injunction, right or wrong, became the judgment of the court"). Thus, in *Izumi* the United States recognized a court's duty to ensure that consent decree proposals are consistent with the underlying laws. U.S. Brief *Amicus Curiae, supra* n.1, at 27.

[10] After an extensive, independent public interest analysis, the district court approved the MFJ, finding, *inter alia*, that the information services restriction was "necessary" to prevent further abuse of the local operating companies' bottleneck power. 552 F. Supp. at 189. The BOCs contend that in 1982 the district court recognized that the need for line-of-business restrictions would disappear in time, BOC Opp. 4 (citing 552 F. Supp. at 194-95 & n.264), but they omit the remainder of the cited passage; the district court merely stated that the need for the restrictions might disappear *if market conditions such as the BOCs' monopoly power over local facilities changed*. In its most recent ruling, the district court found, based on overwhelming evidence, that the BOCs still possess monopoly power over local facilities and that under current market conditions competition would be eliminated were the BOCs permitted to enter the information services market. 767 F. Supp. at 315, 326; App. 35a-37a, 61a.

some deference in the sense that the court should not insist on the "best possible" settlement, *see infra* p. 8, a court must ensure that its orders are consistent with the underlying statute at issue.

Moreover, petitioners are aware of no case that precludes a district court from weighing evidence and finding facts when DOJ's motion is *opposed* by a party to a decree, and there is no principled basis for affording greater deference to DOJ when its motion is joined by a private party. DOJ does not become the arbiter of the public interest merely because a self-interested private party joins its motion. A third party's wishes cannot strip a court of its duty to resolve disputed facts in order to ensure that its orders are consistent with the public interest.

3. The BOCs contend that APA-style review is appropriate even though DOJ is not acting as an administrative agency. BOC Opp. 18 n.14. Without legislative direction, however, courts have no basis for ceding to the executive branch virtual control over exercise of the courts' Article III powers. Congress has the power to vest an executive agency with authority to hold proceedings and make "public interest" determinations with independent legal significance, and can subject those findings to limited judicial review, but it has not done so here. Indeed, the Tunney Act expressly requires the courts to determine the public interest.

4. Review is also warranted to resolve the conflict and confusion that currently exists regarding the proper judicial role in reviewing proposed consent decrees. To obfuscate the need for review, respondents have mischaracterized the holding of *United States v. American Cyanamid Co.*, 719 F.2d 558 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984). BOC Opp. 15-16; U.S. Opp. 10. In *Cyanamid*, the district court declined to apply a modification standard set forth in the decree, and instead applied a "public interest" test. The Second Circuit expressly held that it did not matter which test was applied

because the public interest test—properly understood—was substantively identical to the test contained in the decree. 719 F.2d at 565. The appeals court reversed the district court because it had failed to make an independent determination whether the proposed modification would be anticompetitive; the district court had accordingly erred by "deferr[ing] to the judgment of the Department of Justice." 719 F.2d at 566-67.[11] Thus, the district court in *Cyanamid* applied the same standard the D.C. Circuit adopted here, and the Second Circuit reversed.

Respondents are similarly cavalier in their claims that "all lower courts" are in accord with the views expressed by the D.C. Circuit in this case (BOC Opp. 12). Indeed, *Cyanamid* was followed outside the Second Circuit in *United States v. Jas. H. Matthews & Co.*, 1989-1 Trade Cas. (CCH) ¶ 68,441 (W.D. Pa. 1989), where the court made detailed, independent findings of fact as to the likely effect on competition of terminating the decree. The court held that while a "degree of deference" is due to DOJ, the court was required to decide whether termination would be anticompetitive and therefore inconsistent with the public interest. *Id.* at 60,434. Moreover, courts applying the public interest standard to proposed environmental and civil rights decrees routinely engage in independent resolution of disputed facts.[12]

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[11] The BOCs (but not the United States) contend that *Cyanamid* was limited to the issue of "the Department's attempt to disavow *Brown Shoe*," and that *Cyanamid* therefore stands only for the proposition that "DOJ is bound to follow Supreme Court precedent." BOC Opp. 15-16. Nothing in *Cyanamid* suggests that DOJ was refusing to follow Supreme Court precedent; the decision merely states that the *district court* erred by ignoring *Brown Shoe and* by deferring to DOJ. 719 F.2d at 567. The decision clearly states that deference to DOJ is not appropriate and that the district court was required "to make findings of fact" on the state of the market. 719 F.2d at 566-67.

[12] *See* Pet. 21 n.36. Thus, a conflict plainly exists between *Matthews*, *Cyanamid*, and numerous environmental and civil rights decisions, on the one hand, and certain cases cited by respondents such as *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade

Respondents' repeated citation to lower court cases using the phrase "reaches of the public interest," *see, e.g.*, BOC Opp. 13, 21-22; U.S. Opp. 7, 10, does not demonstrate uniformity on the question presented here. That language was first used in *United States v. Gillette Co.*, 406 F. Supp. 713 (D. Mass. 1975), to convey the unremarkable proposition that when the government chooses to settle a case as an initial matter,

> [i]t is not the court's duty to determine whether this is the *best possible settlement that could have been obtained if, say, the government had bargained a little harder.* The court is not settling the case. It is determining whether the settlement achieved is within the reaches of the public interest.

406 F. Supp. at 716 (emphasis added). The "reaches of the public interest" standard means only that a district court is not free to reject one *procompetitive* proposal

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Cas. ¶ 61,508 (W.D. Mo. 1977), and *United States v. National Finance Adjusters*, 1985-2 Trade Cas. ¶ 66,856 (E.D. Mich. 1985) (U.S. Opp. 7-9), on the other.

A number of the cases respondents rely on (U.S. Opp. 9 n.6; BOC Opp. 13-14 n.7), however, simply do not reach the question of a court's ability to resolve conflicts in the evidence in making the competitive impact determination, or do not otherwise support respondents' position. *See, e.g., Sam Fox Pub. Co. v. United States*, 366 U.S. 683 (1961) (sole issue was intervention); *United States v. Associated Milk Prods.*, 534 F.2d 113 (8th Cir.) (same), *cert. denied*, 429 U.S. 940 (1976); *United States v. G. Heileman Brewing Co.*, 563 F. Supp. 642 (D. Del. 1983) (same); *United States v. Stroh Brewery*, 1982-2 Trade Cas. ¶ 64,804 (D.D.C. 1982) (same; court nevertheless confirmed that it would make the public interest determination); *United States v. Yoder Bros.*, 1989-2 Trade Cas. ¶ 68,728 (N.D. Ohio 1986) (government's evidence was unrebutted); *United States v. Louisiana Pac. Corp.*, 1990-1 Trade Cas. ¶ 69,077 (D. Or. 1990) (review of agency action under the APA); *United States v. Columbia Artists Mgmt.*, 662 F. Supp. 865, 870 (S.D.N.Y. 1987) (no evidentiary conflicts; court nevertheless determined whether the government's explanation was both reasonable and "persuasive").

in favor of a second *procompetitive* proposal it believes would be superior.[13]

Thus, lower courts have generally agreed on an issue *not* presented here: deference to the government's decision not to bargain harder to obtain the "best possible" procompetitive settlement.[14] The issue presented here, however, is whether a district court has the authority to weigh evidence and make an independent determination whether a proposed modification will be procompetitive or anticompetitive. On that question, the lower courts are plainly divided.

5. Respondents do not dispute that the allocation-of-powers questions could have been avoided had the court of appeals applied the decree's built-in standard for modification, section VIII(C), rather than the general public interest standard. The BOCs' contention that the parties to the decree "explicitly agreed" that the general public interest test would govern future consensual modifications, BOC Opp. 5, is absurd. The D.C. Circuit searched for evidence of the parties' intent because it found the parties had not explicitly agreed. 900 F.2d at 291; App. 83a. In its search, however, the court failed to take into account the interpretation of one critical "party"—the district court that drafted the provision at issue—and failed to consider the history of the provision and its interpretation by the litigating parties. That fundamental

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[13] The *Gillette* court did not limit itself to reasonable-basis review. It held hearings and considered extensive evidence from intervenors, following which the proposed decree was modified as a result of the court's suggestions. *See* 406 F. Supp. at 715, 716.

[14] For example, the court in *United States v. Alcan Aluminum*, 605 F. Supp. 619, 622 (W.D. Ky. 1985), *cited in* U.S. Opp. 9 n.6; BOC Opp. 22 n.20, evaluating a proposed decree as an initial matter, followed this standard but made an independent determination that the "pro-competitive interests advanced [in the decree] outweigh" anticompetitive concerns.

error in decree interpretation conflicts with settled decisions of this Court and other circuits. *See* Pet. 23-26.[15]

6. The BOCs previously argued that the petition for review of the D.C. Circuit's first ruling and the application to stay the district court's decision on remand were premature. Now they argue that it is *too late* for the Court's review because they have invested heavily in information services. BOC Opp. 11. That, however, is not a legitimate reason to leave unresolved a legal issue of national importance. The BOCs knew that this case was not final when they made investment decisions. Indeed, they argued to this Court that the district court's stay—which was intended to eliminate the risk that "substantial funds could be spent in reliance on a decision which could subsequently be vacated" (767 F. Supp. at 333; App. 75a)—was unjustified because the BOCs would "structure their own transactions in such a way as to minimize potential risks" stemming from a later reversal of the district court's decision. BOC Opp. to Applic. for Stay, at 16, No. A-91-267 (filed Oct. 22, 1991). The BOCs cannot now be heard to argue that their investments should preclude plenary review.

CONCLUSION

The Petition should be granted.

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[15] The BOCs' statement that "no party to the decree questioned the Court of Appeals' interpretation," BOC Opp. 25, tells only half the story. The court of appeals found it "surprising[]" that when asked about the court's interpretation of the decree at oral argument, DOJ *took no position*. 900 F.2d at 294 n.11; App. 90a. That is not, in fact, surprising, because DOJ had never taken the position that section VIII(C) applied only to contested modifications, and DOJ and the BOCs had filed over one hundred motions under section VIII(C) in the years following entry of the decree—including the motions at issue here.

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